SYLLABUS

Intercultural Socialization (Afro/Nuser 311)

Spring 1989

Professor: Reginald Clark
Office: BC 450

Office Hrs: W 1:30-4:00
Tel.773-3848 (Dept.Off.)
773-3485 (Prof.Off.)

COURSE DESCRIPTION:

This course examines the individual cultures and intercultural relationships of racial and ethnic groups in the United States. Our focus will be on "developmental" themes--patterns of role learning, values and attitudes toward self and other, and status attainment--that characterize the experiences of various racial, ethnic, "class" and "minority" groups. Also, we will give attention to themes of stratification, institutional inequalities, and intergroup competition and conflict. Norms, labelling, stereotyping, in-group and out-group behavior, prejudice, discrimination, and social movements over time are discussed as factors that create and/or maintain the structure of group relations in various settings. Classes will proceed in a lecture/discussion/media format.

COURSE REQUIREMENTS:

1. Regular attendance and participation in class activities (10%)
2. Read assigned material prior to classes (10%)
3. Two multiple choice examinations, mid-term and final

Examinations will be given on Wednesday 3/22 and Wednesday 5/24. Each examination will cover only the material that has been presented since the previous examination. Each examination is worth 40% of the final grade.

An opportunity for receiving extra credit (5 points on final grade) will be available. Details on this option will be discussed at the first class meeting. See Dr. Clark if you are interested. All written products are due on or before May 17, 1989.

Textbooks for the Course:

Race & Culture in America: Readings in Racial & Ethnic Relations: Carl E. Jackson and Emory J. Tolbert (editors)

Race & Ethnic Groups, Third Edition: Richard T. Schaefer

Optional Sources

The Aquarian Conspiracy: Personal & Social Transformation in the 1980s, Marilyn Ferguson (on reserve in the Library)

Family Life and School Achievement: Why Poor Black Children Succeed or Fail: Reginald M. Clark

Social Psychology: Understanding Human Interaction, 4th edition: Robert A. Baron and Donn Byrne

Lecture/Media/Discussion and Assignment Schedules

2/1	Week 1	Introduction Schaefer, Ch. 1; Human Rights Article Film: Faces of the Enemy
2/8	Week 2	Basic Perspectives on Minority-Majority Relations Schaefer, CH. 1 & 2 Jackson/Tolbert; Part 2 (Tolbert essay); Part 3 (Coben essay) Film:
2/15	Week 3	Prejudice & Discrimination Schaefer, Ch. 3 & 4 Jackson/Tolbert, pp. 5-43; 85-115; 119-132 Film: Discrimination and Affirmative Action
3/22	Week 4	The Cultural Bases of Prejudice & Discimination in America Jackson/Tolbert, pp. 44-84 Film: Yonkers, N.Y. Lawsuit
3/1	Week 5	Native Americans Schaefer, Ch. 7, pp. 175-212 Film 1: Indians, Outlaws & Angie Debo Film 2: White Man's Way: The Schools
3/8	Week 6	Hispanic Americans, Part 1 Schaefer, Ch. 10 & 11 pp. 321-364; p.127-40 Jackson/Tolbert; Part 3 (Romo essay, pp.223-248) Film: Home Among Strangers: L.A's Latino Immigrants
3/15	Week 7	Hispanic Americans, Part 2 Review for Midterm
3/22	Week 8	Mid-Term Examination Today
3/29	Week 9	Spring Recess
4/5	Week 10	Black Americans: Social Movements & The Legal System Film 1: Eyes on the Prize: Voting Rights Film 2: Supreme Court Cases: Brown & Roe Film 3: Portrait of a Supreme Court Justice

4/12	Week 11	Black Americans: Slavery, Legal Segregation, Desegregation Schaefer, Ch. 8 & 9 Jackson/Tolbert, pp. 133-175; 176-183; 209-222
4/12	Week 12	Asian Americans Schaefer, Ch. 12, 13 & 14; pp. 122-130 Jackson/Tolbert, pp. 245-297 Film: The Color of Honor; Japanese in WWII
4/26	Week 13	European Immigrant Groups in America Schaefer, pp. 102-103, 164-173; 403-433 Jackson/Tolbert, pp. 119-132 Film: The Irish
5/3	Week 14	Women & Ethnic Women as an Oppressed Majority Schaefer, Ch. 16
5/10	Week 15	Parents & Families as Change Agents Clark, Family Life and School Achievement
5/17	Week 16	Social Movements and Change Strategies Ferguson, The Aquarian Conspiracy: Personal & Social Transformation in the 1980s (on reserve in the Library) Review for Final
5/24	Week 17	Final Exam

Strategies for effecting change

AFRO/HUSER 311
SPRING 1989
R. CLARK

Revised Readings Schedule for Jackson & Tolbert Selections

2/8	Tolbert, "Blacks and the American Mainstream" Pg. 175-217
2/15 & 2/22	Hodge Pg. 5-42, (Hodge and Struckmann Pg. 83-156 "Some Components of the Western Dualist Traditions")
	Smith "The Politics of Racial Inequality" Pg. 161-174
3/29	Romo "The Urbanization of Southwestern Chicanos..." Pg. 339-364
4/5	Coben "The Failure of the Melting Pot" Pg. 297-318 Gethaiga "Race in the Mind of the South" Pg. 218-225 Tolbert "Federal Surveillance of Marcus Garvey..." Pg. 319-338
4/26	Smith "The Politics of Racial Inequality" Pg. 161-174
5/3	Almquist "Race and Ethnicity in the Lives of Minority Women" Pg. 400-436 Tolbert "Black Women Facing the Odds" Pg. 437-459
5/10	Jackson "A Socio-Psychological Analysis on Black Families..." Pg. 226-233 Jackson "The Psycho-Social Aspects of Black Childrearing" Pg. 239-253

Intercultural Socialization

1.0 February 8

Xerox copies of Tolbert

relationship between different groups of people in US---question from human development research

Human beings motivated by 4 basic desires:

1) NEW EXPERIENCE---crave excitement/ can't grow w/o New experience, a la words, ideas, people, situation)

2) SECURITY---don't know where next meal will come from, etc

3) RESPONSE---need to be heard---to be ignored-worse than torture

4) RECOGNIZED---rewarded for good behaviour, prased for good things

HUMANS MOTIVATED TOWARD GROWTH VIA THE ABOVE

FACES OF THE ENEMY: talks about psychological process within self which leads to actions we take in our daily lives. Identifies people within our racial/ethnic group = our friends, chose enemies via very selective process ----

visual characteristics---justify not liking a person via stereotype---LABELING-----find the flaw to justify the hate (practice of prejudice)---eg., Iran---> Ayatolla w/ feeling to justify hatred (labeling before action); qualities; attitude re: prejudice belief

1) CONFORM TO THE NORM OF RATIONALITY --- adjust perception w/ changing reality.

2) NORM OF HUMAN HEARTEDNESS --- values _____ (affected/feeling level).

Set up situation of US vs. Them---we are good, they are evil; we are victims, they are to blame (they'll do us in) prejudice=pre-judge, premature cognatic fix (brought about by stereotype)---even the comic books: violates rationality norm---aren't adhering our responsibility; intolerance---rejection of culture . . . zzzz, other than our own---eg., Amish (violates human heartedness)

Bigotry zealous w/ group devotion and/rejection of groups other than our own; unquestioned belief of superiority of own group and inferiority of others: Ethnocentrism Exenophobia---fear of . . . aversion to all who are sen as

different or strange]

[WE all have a conscience---can't be happy if violating human heartedness, must justify agressive actions---proceded w/ labeling--->will be beat by new knowledge, education]

3 PERSPECTIVES: FUNCTIONALIST, CONFLICT, LABELING

LABELING [previously described:] process of putting names on people and following behavior---takes focus off of other explanation---you have a convenient label

FUNCTIONALIST: groups in society as series of parts all grouped together to maintain it's stability----moral justification for societies that routinely deny groups full access, therefore it's okay; discourages minorities to seek change.

7 DYSFUNCTIONS OF SOCIETY: [see p. 20]

1) fail to use resource of all individuals within society = economic waste.

2) places social burdens on the major of society = taxes go up.

3) time is lost----takes time to enforce laws that limist other's rights

[PERSONAL EXCURSIS: How can we make society smaller---point to inter-relatedness of each action and person to ourselves]

4) undermines relations with other countries----country A's kinfolk discriminated, A less likely to converse w/ it.

5) barrier to communication----supression of info from minority cuts off free into from all.

6) hostility toward one group easily displaced to any group that happens along---prejudice allowed=spreads.

7) subordination of one group = disrespect for law enforcement.

[PERSONAL EXCURSIS #2: use of guns and feelings of helplessness within society----reducing the power from distant borders to the palm of one's hand----welcoming the wild wild west----eg., "US gov't can't get it done so I'll get it done."]

RE #5---ACCESS TO INSTITUTIONS EFFECTED:

labor/work, education, political arena, housing, media, religious institutions, family/community----> primary settings under discussion re: how this is played out----in each setting, depending on ethnic/racila groups you belong to----you will be treated differently---not just good opportunities but abilities or willingness to integrate.

5 PROPERTIES OF MINORITY GROUP:

1) unequal treatment from dominant group

2) display distinguishing phys/cultural differences

3) membership with group involuntary

4) merry within minority group

5) aware of subordinate status

RACIAL GROUPS = minority/majority group classified by obvious physical characteristics, social label---no biological basis [socially developed phonomenon].

ETHNIC GROUPS = difference is cultural in anture; differenct value system, background.

4 WAYS A DOMINANT-SUBORDINATE GROUP PATTERNS EMERGE: (chapter 2)

1) voluntary migration

2) involuntary migration

3) annexation (southwestern US)

4) colonialism

7 CONSEQUENCES OF MINORITY GROUP:

1) Extermination: holocaust (genocide)

2) Expulsion: (eg., Vietnamese boat people)

3) Secession: Jewish state 1948

4) Segregation: minority group segregated against, eg., 3 black families in one block of 15 houses--- 48% whites upset, 50% wouldn't move to that neighborhood.

5) Fusion: indians in Mexico and Latin America

6) Assimilation: take on characteristics of majority group/accepted as part of the group.

7) Pluralism: an ideal (not really a current reality); minority group adopts certain majority group characteristics and maintain ethnic identity.

2.0 February 15

article: 'Celebrating Human Rights: What, exaclty, Was Promised in Covenant of 1948?" LAT, 12/10/88 - DECLARATION OF HUMAN RIGHTS (US opened up to international standard) what is appropriate affirmative action? Eg., opening the doors of opportunity without taking other factors into condition (eg., give that person the chance to compete for a job when the minority person isn't equally trained).

what are they using whole groups of people out? If it is a true test, than how can the minority persons be brought up to a competitive level?

Federal Laws protecting minority rights: Title 9 (1972; a biggie), opening to have access to areas traditionally held by a different group.

[excursis: roll call and self-class goals]

PREJUDICE: [Move to discussion discrimmination as offshout of Prejudice]

3.0 February 22

understanding how different cults relate to each other - quality of life, health of democratic state (closeness of state w/ idea), measure this by equal access of minority to benefits of society . . . via below listed institutions

FACTORS IN ACCESS TO SOCIETY'S BENEFITS:

1. Demographics, how large is the group (impact in political fights . . .)
2. prejudice, stereotyping (defined: attitude, schemata, a way of looking at some, about members of a specific group that is not based on total fact---preconceived notion, usually based on some negative emotion, has a tendency to lead to some sort of aversive behavior toward the group), encounter from other groups, (Merton, p. 58, can be

prejudice and don't discriminate and visa versa).

3. discrimination, = practice, behavior or law or custom that deprives another from certain societal rewards ---> EXCLUSION [question of use of "normal procedures" leads to the maintanance of the status quo, discrimination if law is consistently excluding a certain group]

4. cultural values differences (consensus/dissensus between group and larger society)

5. sense of relative deprivation

MEASURE OF CULTURAL ASSIMILATION (AREAS IMPACTED BY EACH OF THE ABOVE FACTORS):

1. degree of structural assimilation (access to societal rewards)

a. economic

b. political (order structure of society)

c. education

d. housing

e. media

f. arts

2. degree of cultural assimilation

THREE FORMS (LEVELS) OF DISCRIMINATION [ATTITUDINAL]:

1. simple avoidance. eg., effort to distance oneself with a certain individual

2. exclusion from institutions (jobs, schools, etc.). Until '64 in certain states certain races couldn't vote via literacy test and polling taxes

3. open physical assaults. 1890's 4,000 blacks lynched in U.S., 2 or 3 in the last year

SIX FORMS OF SUBTLE DISCRIMINATION: [BEHAVIOR](social psych book, Burns)

1. withholding aid, lady in the supermarket/wrong number study

2. performing trivial or tokenistic actions, eg., company of 150 employees satisfied w/ hiring of two minorities, met the quotas, resistence to "quota"s intention

3. they-all-look-alike-to-me mentality, seeing the race versus seeing the person

4. to de-value the achievements of a group and an individual (member of a certain group), attribute their success to luck, circumstance, "their way"---differential reward pattern

5. questioning the competence of a boss because of their cultural/sexual group or political persuasion. performing for the boss, males get more cooperation . . .

6. setting people up for failure---giving them a task that you know they'll fail you, whatever the person does is never good enough.

[[we all discrimminate because we all selectively attend to our environment, what you give attention to and exclude.]]-->

what do we notice first about a person?

(1) RACE/COLOR, GENDER, AGE,

(2) APPEARANCE (clothes, hair style, their associates),

(3) ATTITUDE, DEMEANOR (posture, interpersonal language, facial expression---> 6 BASIC FACIAL EMOTIONAL EXPRESSIONS: happiness, sadness, surprise, fear, anger, disgust).

The point: we have control over the things we attend to, understand what we see and don't see. We all have prejudices because Social scientists say we're cognitive misers (don't want to have to evaluate every situation), want to size it up in a second . . . not the question, but on what basis? Tendency to let this quick judgement scenario (which is necessary in some situations) carry over into other areas (eg., access to institutions) where it might be inappropriate.

4.0 March 8

March 8

Phyllis Lerner; Interweave; 1419 Lakeside Lane, HNBH, CA 92641 714-960-0307

ISSUES OF GENDER:

1. Instructional Contact

2. grouping/organization

3. reproof/discipline/control/management [black males most reproof, negative; women cush]

4. Self-concept

5. Evaluation

a. women reinforced on appearance of self or appearance of work; men on content.

b. slipped into learned helplessness - doing something for some one else - use inquiry method to instruct

c. males = failure = external circumstances; females = success = luck

County of LA; Commission of Human Relations; 184 Hal of Records, 320 W. Temple Street, LA 90012:

Material up to American Indian (not including material on Indians) - education = institutions needing equality, training for ability of competitive.

Midterm Exam: Scantron 886 - write out 5 factors that impact on quality of life of ethnic group; impact on degree of assimilation, degree of group conflict, [cultural values, discrimination] , 6 dysfunctional consequences of discrimination; multiple choice: 7 forms of subtle discrimination, 3 reasons/motivating factors for company to initial affirmative action, what is affirmative action [different defs]; what is reverse discrimination; what 2 main agencys/types of organization out there trying to reduce discrimination; what is the civil rights act of 1964; what does the legal case Brown vs. board of education, topeka 1954 result in; under what circum might a companies actions/procedures thought to be neutral still be challenged as discrimminature [idea of the status quo]; what strategies book suggest for reducing prejudice [building positive self-esteem for youngster]; what is the equal status contact hypothesis; cognative schemata; what is prejudice; what is discrimmination; 4 main theiries why people becme prejudice; seeing stranger first thiings noticed; what is assimilation; Yonkers NY raised questions about affirmative action [education, housing], Hodge and Structman, Freud's view of nature; some components . . . ; of the Western Dualist trad, 83-; Politics of Western 161-; Tolbert Jim Crow 175

Shaffer, What is sub or minority group vs, dominant group, what is their relationship; characteristics of memebers of minority group; what deose ethnicity refer to; 3 main theorys, what is conflict;labeling; and fuctionalist theory, what do they say; what are stereotypes; what are scapegoats;

6 ways group becomes minority group (annexation); what is pluralism say; what is institutional discrimmination (Puerto Rican cops in chicago); what role did reagan play in interaction

starting place: own personal experience, [text] add to it via history lessons--the American Indian, Columbus land and culture---> driven to manifest destiny, 1700's trouble with Settler's and indians, slavery? Indian's not compilant then

1824---Federal gov't of US ---- Bureau of Indian Affairs (War Dept), conflict in conception, organized against indians, less blookdshed.

Indian Removal Act (1830), relocation of all Eastern tribe across the Missippi, one big battle, systematically kick them out, feeling that indians have no rights; led to FORCED MIGRATION, Trail of Tears. total disruption of indian culture. Souix of South Dekota, we can fight or sing treaty.

Fort Laramie Treaty of 1868 68-70, Sitting Bull's revolt; set-aside territory for indians overrun by settlers; 1876, the battle of the Little Bighorn; Souix sells Black Hills, 5 smaller reservation, Apples, Uncle Tom-mohawks . . .

millenarian movement: ghost dance, collapse of the indian culture, escaping from unnatural, unreal treatment; 1890 Wounded Knee, 300 Souix, 25 soldiers, trying to stop Ghost Dance religion, reservation system basis of US gov't/Indian relations. slaughter and disease.

5.0 March 29

Film: Home Among Strangers - Latino community, 6 institutions: church, school, immigration, employment/unions, limited political clout, language issues. Concentrate study on Van Nuy (before mostly white bedroom community), San Fernando (always mixed), coming in contact with Amer institutions, process of integration . . . 1st the church

Pope's visit in So Cal, when southwest became US struggle in church for control among Irish, Spanish, Polish, etc, that the Irish won. But now population/immigration pressures forcing reavaluations: two churches in San Fernando, Santa Rosa 9 services in spanish started as mission, Saint Ferdinand's one service. racism,

employement: taking jobs that anglos wouldn't, service job (few unions, no benefits, low wages), union influence

greater than ballot box --- previously followed progress from unskilled to business and professional jobs, progress through hard work and not formal education, but middle ground from unskilled to trade shops to professions is shrinking (the trades).

schools: other immigrants school = step ladder out of poverty, lack of success in latino community, Eastman project = english classes, other courses in spanish to keep them from falling behind, old bilingual programs = all education in two languages, lanugauge issue some think issue of intelligence, early education success, full english ed by junior high, encourage further ed. 7% latinos complete college ed, 12% blacks, 23% whites, but recent immigrants skew educational percentage of success by latinos

political power: JFK, Irish Catholic, but ran simply as American. Ethnicity liability on National level, but asset on local level (JFK in Catholic Boston). La Raza Unida, lost power after 1848 and decades following, until 60s. Latinos 70% in San Fernando, 40% voters, 7% voter turnout.

lack of ed = lack of upward mobility, political clout.

FILM: A White Man's Way. Indian Wars over ---- Genoa School: transform Indians children, military school, American industrial Age, vocational training, dress parades, uniforms, bugle calls, bells, eliminate all of the natural rhythms of the indian life. theme of schools: separation - family, tribe, culture. 1st Indian Military Boarding school: Capt. Richard Pratt, theme "from savagery to civilization," cultural annihilation. Sometimes parents visited which strenthen family ties. Given white values, religion, Christianity American religion like English American language.

current reservation troubles and passage of time, soften harshness of the past, looks back at their experience with mixed feelings. But those are those that survived, those that were broken don't want to talk about it, American schools = alienation from school society, alienated from indian culture. "When Legends die, dreams end and when dreams end there is no more greatness."

6.0 April 5

Quaility Education project: private educational foundation, parents involved in children's ed., premise: parents children's first/most important educator, many don't know how to do that---minority/poverty and education, connection between parental involvement and achievement.

Disenfranchised (blacks), fear of schools failing children as it failed them, cycle. Time constrains of parent involvement----but all parent's care about their kids. Cultural deprivation theory, genetical inferiority, family pathology---information that wasn't useful to an educator. not structure of the family but process of the family, issue is the process between parents and children a la Clark's eleven factors: eg., reading material available at the home, parent's value education, in touch with the school (parent/teacher conf), tv was monitored, homework monitored, outside activities that encouraged learning (piano lesson, etc.)----how to impliment info: clear two-way communication, principal and teacher monthly newsletter with relevent academic/corriculum info with tear-off form for parent's to respond; weekly take home folder contains corrected homework/school work to get parent's abreast with current progress; education sunday; parent's pledge (first/most important educator) monitor homework, read 15 minutes a day, key meetings (p/t conf, open school night).

"Stand And Deliver"---

[[[expectation]]], living up/down to what's expected of them, Ray Rist, based on what you expect dictates how treat kids,

[[[tracking]]], advanced placement, standard, basic . . . kids learned best in hetereogenious setting--broader exposure, spark to challenge their learning

[[[cooperative learning]]], versus grading on a curve---> someone gets a good grade means that someone doesn't, someone wins/someone loses, depends on reward structure; c/l --- fosters racial relationships, must be structured so that students dependent on each other; [[[mainstreaming]]], small grp c/l setting handicapped student accepted by "normal" students more quickly;

[[[positive role models]]], kids at early age talk to them about how they (successful minority person) got there, minority students don't see the payoff, on-going "career day", doctors need math, etc., asian students understand that but not hispanic or black students.

[[[Values]]], <----

[[[effective instruction]]], knew his stuff and able to give it to his stuff, Margo Collins, interdisciplinary approach;

[[[parent's role]]], parent's self-perception, "he's slow, he's always been slow"---parent's expectation! ----> not necessarily talent but perseverance.

7.0 April 12

"Stand And Deliver" re-reviewed.

Chicanos = Americans of Mexican decent. American equivelent of Mexicans and or Spanish---> Hispanic heritage (eg, roots in Central or South America).

groups have in common: language - Spanish and often skin color (lighter skin color = high social status)

Keys groups: 1) Chicano (Mexican) 10.3 million, Southwestern United States; 2) Puerto Rican, 2.6 million, East Coast; 3) Cuban 1.1 million, Florida.

Hispanic, global ethnic entity (as if one group); Latino: preferred by politically conscious Hispanic because of above;

what's in a name? Power of self-identity, previously assigned to minority group indicating social status, so minorities decided own labels. Choice of term "black" used discriptively instead of proper upper case as designated for racial groups, eg., Asian, Caucasian, Hispanic, Korean, black . . . {switch to use of term "African-American"};

undertanding Hispanic groups = understand history of these groups, eg., Hispanics controlled Pacific Southwestern US less than 150 years ago---western migration led to conflict 1848, Treaty of Guadalupe Hidalgo: $15 million, California, part of AZ and NM, Texas thrown in for free, US part (new) 75,000 Americans could keep Religion, language, and culture. 1860, Chicanos owned all CA parcels of land value $10,000 or more. 1870's they hold only 25 percent.

Repatriation: sent to Mexico, accused of being illegal aliens.

Los Brazeros program (1942-64): contract laborers,

Operation Wetback (1954-56): effort by gov't to crack-down in Mexicans entering the country illegally, more stict immigration quotas in US (led to more illegal crossings).

Immigration Reform and Control Act (1986): trying to bring control to crazy situation, make experience of illegal aliens more humane,

Relative Deprivation: people tend to feel deprived in relationship with the people who they identify with . . . how the riots is explained.

8.0 April 26

4-19

extra credit = William J Wilson, lecture coming in may, listen to it and write paper on.

Chicano - review of last week 10 minutes.

Chicano (latino) representatino- taken during the census to show the percent in each of the upper , middle and lower classes. Majority are within lowe classes and lower income amounts. High dropout rate in school and poor health care. Only 25 to 30 percent are either upper or middle class.

Puerto Rican - are different in comparison with Latinos. they come from an island that was ruled by Spain until 1898 when America took it during Spanish-American War. The island has been in turmoil as to whether it would become a state of the nited states or it would be ruled by the people who lived there (independent country owned by U.S.). they had a third choice to move to the aminland primarily - New Jersey and New York. They brought there culture and ways of life that in New York City --- it is the 2nd largest place that Puerto Rican's live other than P.R. If they moved back to P.R. they were called Neoricans.

Main issue among Puerto Rican Culture - [Color Gradient] the lighter the skin color the more status you possess. This is due to intermarriages between Puerto Rican and Americans. In reality they were no better than any one else regardless of color.

Medium Family Income - less than 50% that of the white counterpart (p. 331 book)

Lack of Experience - causes larger amount of low income.

Education - lack of required education to get the larger paying jobs.

Discrimination - due in part to the requirements needed to suceed in society. and when there is in fact atrue discrimination against them they have neither th emoney or the knowledge to pursue the person. Most Puerto Rican's feel today that they in one way or another they have been discriminated against. Most have done nothing about it, they just build up an aggression towards those who discrimintate against them.

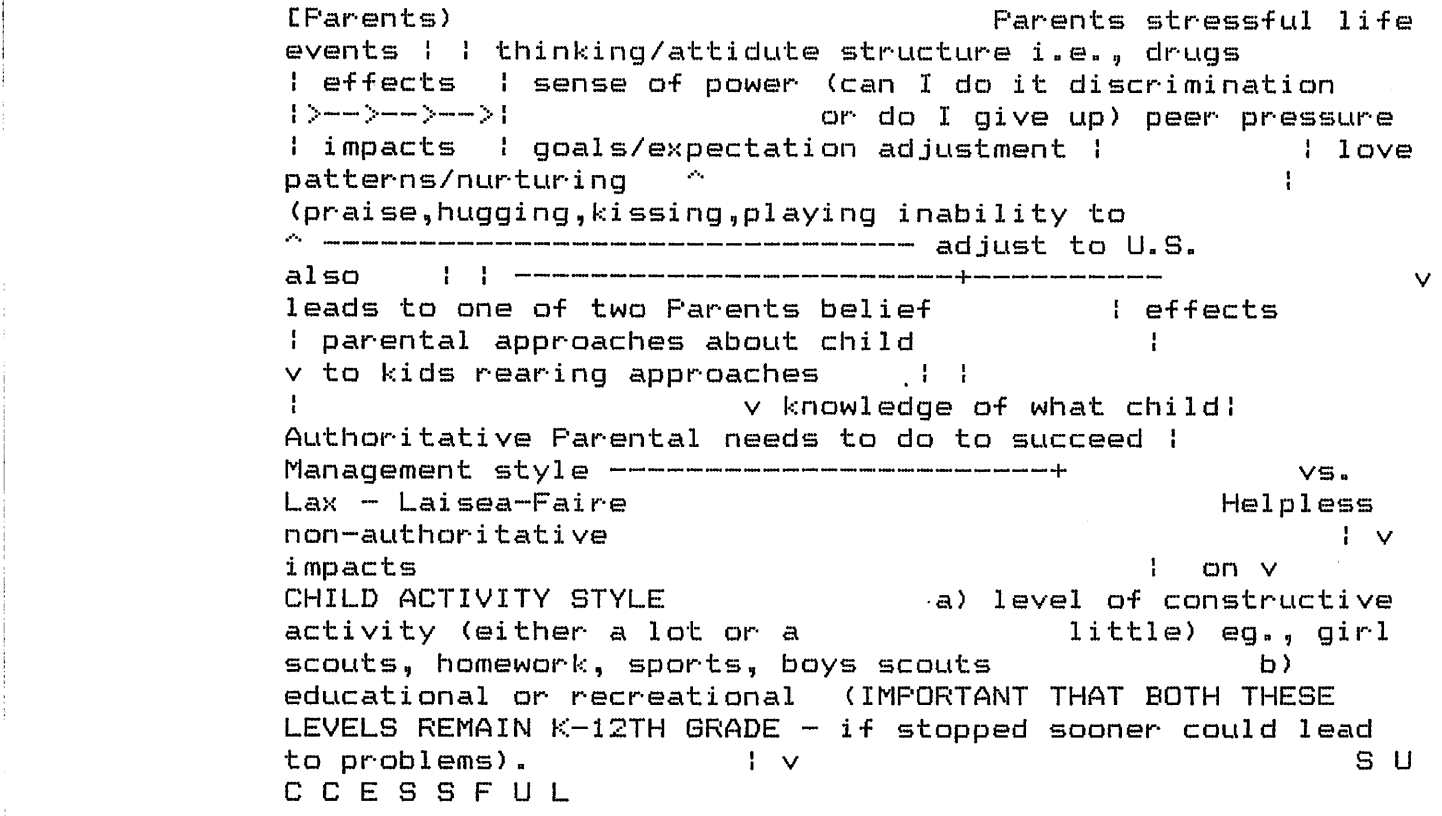
[Overall Cost of the Problems] - most are on welfare or public assistence. They are very much dependant on the

majority of society.

Most Puerto Rican families are quite large.

[[[CLARK THEORY]]]

Theory of Parental Impact on Children That Leads to an End Behavior



Degree of success depends upon how much the parent has approached the responsibility and dedicated themselves towards their children.

[ASIANS]

a very diverse group (se book of all) each of the groups are different even though some common traits are found among all. differences ---language, religious affiliation, cultural histories.

Dr. Clark is going to look at 5 groups

Asians make up 3 to 4 percent of all people in U.S. ranked third among minority

[Korean-American] Immigration:

1903-1919 ---- 7,000 laborers came to hawaii (1st wave) 1951-1964 ---- 14,000 wifes of amercian servicemen (2nd wave) 1965-present-- well educated/skilled (3rd wave)

Second Act: immigration -Naturalization Act of 1965 allowed quota's of people into U.S.---known as the National Origins System. Where you were born (what hemisphere you came from)---told when you could come into the U.S., 3 percent would be allowed in, in comparison to the amount of people already here

First Act: immigration and Nationality act of 1952 (McCarren & Walter act)-retained the quota system and origin system (where you were born) --- but barred communists from entering.

The change between act one and act two was the origin act One: was where you were born and the 2nd Act: What hemisphere you came from.

Yellow Peril Indo-Chinese middlemen minorities low inactivity rate - 8 hours/week 5-6 days balanced activity schedule-study desk at home (94%, 68%)

Hawaiian - racial intermarriage to a very high degree - out group 90% 20 % whites marrying non-whites.

Chinese

Cxclusiion Act of 1882 (1943) before '43 mutilated marriage (not allowed to bring wife and children), after '43, 105 allowed to enter, chinese-born allowed to own property and become citizens.

Alien land Act (1913) 1920 - not a citizen therefore can't own land.

tsu (clans), hui kuan, tongs: (1) mimic traditional chinese organizations (2) mutual assistence, (3) tend to lead to conflicts---don't always agree (4) the old associations tend to decline, (5) when dealing with dominant society pretend to be close-knit. 1 of 6 china town resident = poor living conditions. (p. 372) four stages of assimilation of chinese.

9.0 May 3

[the week in news review]

Experts at X, doing 35 hours a week of that activity by age 12!

95% of us capable of learning what it is that school is trying to teach us. Why we don't learn is another thing altogether. Factors of primary importance: what you do with your time . . . Factors vs Responsibilities (eg., coming from a divorced household, poverty, racial discrimmination . . .). Genetic disposition . . .

Tang LAT article and ethnic identity----"thinking Chinese and speaking American . . . "

[Asian-Pacific]

25 major groups, not mono-cultural. Underachievement connection with racism.

Executive Order 9066 (1942)

J.A.C.L.

Mitsuye Endo vs. U.S. (1944)

Japaniese American Evacuation Claims Act (1948)

Issei - 1st generation/born in Japan

Nisei - 2nd

Sansei - 3rd

Yonsei - 4th

10.0 May 10

extra credit: "Mississippi Burning" comments

skin color alone works to a disadvantage, prevents assimilation because they are easily identifiable.

What's in the news:

LAT - Japanese-Americans - $20,000 to internment survivers, (first reparation J-A exacuation claim act) "what's the hurry" per Senator.

Reacting to crime in the wrong way, fixing society by throwing offenders in jail won't work, per newspaper editorial

John Wayne approach to social ills rarely works, per Clark

Stigma, (looks, race, misadventure, past failures) keeps

others at psychological arms length, why, afraid to face ones own vulnerability---only reduced through empathy and compassion.

White Ethnics:

non-WASPS (non-English/Scandinavian populaces); name changes (eg.. 6-3 Italian-American, Zorro= Aramando Catalano---> Guy Williams); Irish, Polish, Italian.

ethnic diversity=fact of life because of nation's immigration beginning, everyone came from someplace else. Stats: 135 colleges with white-ethnic programs

Persistent Ethnicity: sense of identity that goes on first generation of immigration. Scholars previously treated ethnic groups that hung onto ethnicity as pathological.

Symbolic Ethnicity: retaining the symbols of ethnicity, eg., italians and speggheti, it is token (opposed to Persistent) but when involving institutions it's "more" persistent than symbolic.

Marcus Hansen 3rd Generation Effect: process of assim occurs by the 3rd generation. 1st generation, here because dispossessed from previous land, considered "backward" in the new land (awkward customs), language difficulty; 2nd generation embarrassed of parents, tried to fit in, changed names often, denied customs and traditions; 3rd generation, tended to go back and embrace heritage (but after parents already had assimilated into schools and workplace), found it more convenient to reaffirm ethnicity.

Emergent Ethnicity of Blacks . . . and others in the 60's (sense of peoplehood).

Respectable bigoty

Income/Occupation

In Chicago area: 6.9% = Poles, of area businesses .3% directors, .7% officers (1972 study)---> fewer opportunities for Poles to break into old boys club (networking)

Italians 1.9% directors, 2.9% officers

[p 103] "Ethnicity & American Elite" national survey, 545 position holders of 106 corporate boards of those 102 had no Poles on the boards and 84 without Italians. WASPs account for 43%

Axios, So Cal Association of Greek Business men, Man of the Year Award: Spanos, owner of the San Diego Chargers.

READ SMITH ARTICLE!!! "policy of . . . " certain ethnic groups had certain advantages that other ethnic groups didn't have.

Don't hear much about white ethnicity because they've already reached the American Dream.

[WOMEN:]

fit criteria of oppressed and subordinate roles, not based on abilities----confined to being on the bottom.

Sexism = inaccurate belief or ideology that one sex is inferior to another, and that it's okay to treat one sex is inferior to another.

Androgyny: focus on the broader commonality of the sexes. People can be aggressive or regressive based on the situation and no "sex roles." Biological difference do exist and should be acknowledge.

Gender Identity: perseption one has about oneself as a man or a woman. It's effectuated or actuated through the Sex roles that they carry out.

Sex Roles: in family or workplace, but they tend to reinforce male dominance. Labeling theory useful in talking about sex roles: Sex-Typing (what a man is supposed to do and women is supposed to do). If things were equal it won't be so bad but as it is women get the short end of the stick. We get them to perform by labeling one as "good" or "bad". Conflict theory says that the power has rested with the males because of physical superiority . . .

11.0 May 17

employment, ed, politics, religion, family life--> women always on the bottom.

labeling/functionalist/conflict view> book focuses on conflict re: lower status=fewer opportunities. more freedoms than USSR (eg.,) but a fair amount of inequality based on race/gender---> explain nature of interpersonal communications

Employment: "traditional women's jobs" child-care, food services, housekeeping, clerical---> women get paid less.

Femininization of poverty - high % because of labor market predisposition to not higher women into higher paying jobs [sex-typing: "what is women's work" and "what is men's

work"--> stay home and have children, keep home; backlash: monetary payment for housekeeping]. Connection of employment of men and treatment of women: rate of domestic violence; minority males not being able to give to their women in the same way as White males.

Sexual harassment: tension between male supervisor's advancements and female worker's job. Seven out of ten women effected by this harassment.

pay-equity: women don't get equal pay for equal work, fed equal pay act 1963, but still trying to get there, "comperable worth"

education: women denied education historically, Harvard closed to women. 1833 Overland College Whesley 1837 open to women. Differential treatment of boys and girls in class (attention, praise, criticism, speaking up in class). Title IX of the education act of 1972: collection of provisions/regulations to open up opportunity for women to participate in previously perceived "male" dominated activities/teams/clubs/events. White females seem to be benefiting more from minority provisions.

Family Life: multiple social roles, majority work (54%), regardless of single/married, with/without children (work/child-rearing/wife). women handle major portion of child-rearing (eg., father's 10 minutes, 26 seconds per encounter; women = the bulk of it), males = verbal interaction 38 seconds a day; entrenched attitude about what's men's work and what's women's work (meal prep, driving around)---plus . . .

Housework: women do 70% of the women, men 15% and children 15%---> [results in role overload for women],

Supreme court record: 1896 - Plessy vs. Ferguson (Jim Crow/Segregation) 1954 - Brown vs. Board of Education (overthrow PvF) - eg., of justices speaking before society was willing to accept it, going beyond what communities might have been willing to accept---> can change attitude by changing behavior, familiarity allows for change of attitude.

women don't get to enjoy the same quality of life that men do,

Religion: women in positions of leadership very rare, exceptions: Amiee Sempson McPherson (Foursquare Gospel), Mary Baker Eddy (Christian Science), Can be followers but not positions of power.

Politics: 5% public office holders are women (lower level offices), history of congress 103 women, over 11,000 men (no

senators or presidents). 1955 polls, public would vote for qualified woman for president. 17% of states' legislators are women, 15% of appointed persons in state boards and commission are women (but on women's interests); women support roles in getting candidates in office. League of Women Voters (1920),

issue of prejudice; Oregon legislater's re: fellow women legislators refered to with words "face" "mouth" "dress" --- not intellectually categorized.

issue of being female and a minority.

BLACK AMERICANS: important things to know: history out of slavery condition. Slavery condition serves as background/foundation of all black experience in America (most brutal in history: kept uneducated) over 5,000 lynchings and murders since 1900. 216 p. things blacks couldn't do. Considered 3/5's of a man in Dred Scott, white man not bound to obey anything pertaining to a black man.

Real damage with black population ith separate but equal policy (leagally, okay to discriminate by race), bus system boycott in 1958, Montgomery, Alabama Martin Luther King (p 232), Active non-violent resistence, willingness to suffer without retaliation, refused to hate opponent, conviction that the universe is on the side of justice, Passive acceptance of injustice=unacceptable to MLK. Violently reacting to Black marches looked bad to the press, had to change tactics. Washington march 1963 (over 200,000), Southern Christian Leadership Conference, 1964 Civil Rights Act (blacks to vote), Watts Riots (rising expectations versus daily realities, it wasn't happening fast enough)---65-67 Black Consciousness (and proud of it), Black Panthers in Oakland, (Negro to Black conversion) 1968 MLK assassinated.

today 25% black population = middle class or above (60's 10-12%); religious, cultural, political nationalism---soul food, big afro. textbooks didn't reflect anything positive of blacks (except George Washington Carver and the peanut factory). 30 years later, blacks and whites unequal educational experience.

Underclass: 10-15% percentage, class of people "I don't want to deal with it", "I'll hustle", 18-24 ill-prepared to compete.

Ted Kopple film: over represented in the negative and under represented in the positive.

11.1 Exam

11.1 Exam

11.1.1 from the first exam - know the difference between:

11.1.1.1 Extermination

genocide, the systematic killing of an entire people or nation. (eg., the holocaust---6 million European Jews)

11.1.1.2 Expulsion

Dominant groups may choose to force a specific minority to leave certain areas or even vacate the country. (eg., Vietnam, 1979 expelled nearly one million ethnic Chinese)

11.1.1.3 Secession

A group ceases to be a minority when it secedes to form a new nation or moves to an already established nation where it becomes dominant (eg., Great Britain withdraws from Palestine and Jewish people achieve dominance in 1948)

11.1.1.4 Segregation *

segragation refers to the physical separation of two groups of people in residence, workplace, and social functions. (1976 Detriot study, "chocolate city, vanilla suburbs)

11.1.1.5 Amalgamation (Fusion?) *

fusion describes the result of a minority and majority group combining to form a new group (A + B + C = D); the melting pot, the cultural and physical synthesis of various groups into a new people [1908 play by Irael Zangwill about a young Russian Jewish immigrant to the US composes a symphony describin a nation that serves as the crucible in which all ethnic and racial groups dissolve into a new, superior stock. sometimes works (eg., Pitcairn Islands, 2nd generation mixed)

11.1.1.6 Assimilation *

Assimilation is the process by which a subordinate individual or group takes on the characteristics of the dominant group and is eventually accepted as part of that group. A + B + C = A (with A dominates in such a way that minorities B and C become indistinguishable from the dominant group). To be complete, assimilation must entail not only an active effort by the minority group individual to shed all distinguishing actions and beliefs, but also the complete, unqualified acceptance of that individual by the dominant society. Usually integration is a form of assimilation.

11.1.1.7 Pluralism *

pluralism implies mutual respect between the various groups in a society for one another's cultures, a respect that allows minorities to express their own culture withoiut suffering prejudice or hostility.

11.1.2 THE AMERICAN INDIANS:

11.1.2.1 4 Different Gov't Acts:

11.1.2.1.1 Indian Removal Act (1830)

All Eastern tribes relocated across the Mississippi River

(in Oklahoma)

11.1.2.1.2 Indian Appropriations Act (1871)
the US abandoned the treaty-making system altogether; the federal gov't negotiated even less with the Indians, but legislated for them without consent.

11.1.2.1.3 The Allotment Act
each individual family given up to 160 acres, no concern for tribal customs or leadership; by 1934 Indians had lost approximately 90 million of the 138 million acres in their possession prior to the Allotment Act

11.1.2.1.4 The Reorganization Act (1934)
recognize the need to use tribal identity; revoked Allotment Act; but use of Robert's Rules of Order and foriegn judicial process discourage the program's success

11.1.2.1.5 The Termination Act (1953)
end of gov't services and arbitrary authority.

11.1.2.1.6 Restoration Act (1973)
return of gov't services

11.1.2.2 Federal Gov't Programs:

11.1.2.2.1 Bureau of Indian Affair (originally part of the War Department)

11.1.2.2.2 Indian Claims Commission
from 1863-1946 Indians could bring no claim against the government without a special act of Congress, a policy that effectively prevented most charges of treaty violations; therefore creation of ICC to act as a court (3 then 5 person tribunal) to hear claims; "If the commission concurs with the Indians, it then determinse the value of the land at the time it was illegally seized. Indian do not usually receive payment based on present value, nor do they usually receive interest on the money due. Value at time of loss, perhapps a few pennies an acre, is considered 'just compensation.' Payments are then decreased by setoffs. 'Setoffs' are deductions form the money due equal to the cost of federal services provided to the tribe. It is not unusual to have a case dismisssed because a tribe won, only to have its settlement exceeded by setoffs."

11.1.2.2.3 The Termination Act
end of gov't services and arbitrary authority.

11.1.2.2.4 Employment Assistance Program (1962)
to relocate Indians, individually or in families, at governement expense, to urban areas where job opportunities were greater than those on reservations.

11.1.2.3 Reasons for violence between Indians and Whites in '69:

11.1.2.3.1 Unkept Promises:
Durin the early 70s, the BIA and the White House made promises that were not carried out on new innovative programs and greater self-determination

11.1.2.3.2 Indian Unity and disunity:
More Federal Money in Indians' hands, although pt in tositive use, also promoted pwer struggle among pan-Indian groups, among tribes, and within tribes.

11.1.2.3.3 Greater Militancy in other protests:
Many Indians, especially the young and urban, felt that more

militant actions by welfare and civil rights groups seemed to bring faster results.

11.1.2.3.4 Government's reliance on a few token leaders: The federal gov't,e speicallly under Nixon, increasinly listened to the more conservative Indian leaders, as if they were the only people with legitimate grievances.

11.1.3 Marcus Hansen's principle of 3rd generation interest; the 3rd generation---the grandchildren of the original immigrants---ethnic interest and awareness would actually increase; "what the son wishes to forget the grandson wishes to remember"

11.1.4 Symbolic ethnicity: It does not include active involvement in ethnic activities or participation in ethnic-related organizations . . . ethnicity has become increasinly peripheral to the lives of members of the ethnic group; although they may not relinquish their ethnic identity, other identities become more important; involves symbols: food, acknowledging ceremonial holidays, and supporting specific political issues or the issues confronting "the old country"

11.1.5 Respectible bigotry: Hostility toward White ethnics (eg., Polish jokes are acceptable, whereas anti-Black humor is considered in poor taste); respectable bigotry is not race prejudice but class prejudice.

11.1.6 White ethnics (italians, poles) have had certain experience what is it: Many White ethnics shed their past and wish only to be Americans, with no ancestral ties to another country (eg., soccor player Boris Shlapak=Ian Stone. To reatin their past as a part of their present they must pay a price, because of prejudice and discrimination.

11.1.7 Theoretical Perspectives:

11.1.7.1 Functionalist: society=living organism w/ each part contributing to its survival, status quo - emphasis on the ay in which parts of a society are structured to maintain its stability.

11.1.7.2 Conflict: social behavior is best understood in terms of conflict or tension among competing groups; the competition takes place between groups with unequal amounts of economic and political power; view more radical than Functionalist, conflict theorists emphasize social change and redistribution of resources.

11.1.7.3 Labeling: the labeling perspective directs our attention to the role that stereotypes play in race and ethnicity; "self-fulfilled prophecy"

11.1.8 know what Brown vs B o Ed case did; 1954 - Topeka, KA, separate but equal overturned.

11.1.9 know what ML King's approach was: Civil Disobedience (Passive resistence); 12/01/55 Rosa Parks on a Montgomery, Alabama bus

11.1.9.1 ACTIVE nonviolent resistance to evil;
11.1.9.2 not seeking to defeat or humiliate the opponent, but to win his friendship and understanding;
11.1.9.3 attacking the forces of evil rather than the people who happen to be doing the evil;
11.1.9.4 willingness to accept suffering without retaliating;
11.1.9.5 refusing to hate the opponent;
11.1.9.6 acting with the conviction that the universe is on the side of justice.

11.1.10 What Socioligicts say Why Black militancy and riots emerged:
11.1.10.1 Rising Expectations & Relative Deprivation:
based on reference group blacks made no gains (though in absolute numbers they gained substantially)
11.1.10.2 Developing A National Consciousness:
11.1.10.2.1 the pivotal role of the federal gov't
11.1.10.2.2 the influence of the mass media in transforming local issues into national ones
Given this increased awareness of of their low status despite years of promises, almost any Black community could explode.

11.1.11 de facto and de jure segregation:
de jure= the assignment of children to schools solely because of race.
de facto=segregation that arises from Blacks and Whites livin in separate neighborhoods.

11.1.12 know about Lowe vs. Nickles case:
1974 - to teach in English to non-English speaking students is illegal.

11.1.13 know about Cisneros vs. Corps Christi:
1970 - Independent school distrit, principle of integration---abolished segregation w/ Mexican schools and white schools (took another five years to clear appeals courts---1974)

11.1.14 treaty of Guadalupe Hidalgo:
The Treaty that ended the war Mexico in 1848.

11.1.15 Sequence of Mexican-American immigration:
11.1.15.1 Repatriation:
1930s, send undocumented Mexicans back
11.1.15.2 Los Braceros:
1942, contracted laborers, 80,000
11.1.15.3 Operation Wetback
1954, crackdown on illegal crossing ("discontinued" 1956

11.1.16 what does the cultural poverty thesis maintain:
"a deviant lifestyle, which involves no future planning, no enduring coommitment to marriage, and absence of the work ethic, this culture supposedly follows the poor, even when they move out of the slums or the barrio (Hispanics= exclusely poor & prone to violence)"

11.1.17 What does the gook syndrome refer to:

fear of losing our national character;

11.1.18 what does the term "high or low inactivity" refer to:
the proportion of people neither in school nor in the labor force (inactive!)

11.1.19 What's the paradox of Chinatown:
glittering outside, poverty inside

11.1.20 What proportion of Chinese Americans marry outside the race:
1/4, under 25 marry non-Chinese

11.1.21 Issei, Nicei, Sansei, Yonsei--refer to (Japanese); know difference

Issei - 1st generation/born in Japan (1930's)

Nisei - 2nd - 1st Americans of Japanese background

Sansei - 3rd

Yonsei - 4th - children of the 60s and 70s

11.1.22 Differences between Anti-Japanese and Anti-Chinese feelings:

11.1.22.1 time: Anti-Ch proceeded Anti-Jap

11.1.22.2 Japanese spoke out more vehemently against the racist legislation than the Chinese-Americans (Issei and Nisei constantly organized demonstrations)

11.1.22.3 Japan took a more active interest in hat was happening to its citizen in the US than China did.

11.1.23 Public Reasons for Japanese internment:
Many feared if Japan attacked the mainland, Japanese Americans would figh on behalf of japan, rumors mixed with racial bigotry that they allegedly assisted the pilots from Japan by cutting sugar can fields to form arrows directing enemy pilots to targets and blocking traffic along highways to the harbor and poisoning drinking water; to make the western portions of the US "militarily secure"

11.1.24 How to Japanese-Americans compare to Whites re: ed/occupation: J-A rank very high compared to Whites; similar cultural values of achievement

11.1.25 what does gender identity refer to:
the self-concept of an individual as being male or female; one of the first identities that a human being acquires and is shaped by the particular values of a culture.

11.1.26 What Are Sex Roles:
The social consequences of gender identity are reflected in "sex roles," which are "behaviors, attitudes, adn activities prescribed for males and females."

11.1.27 the 19th Amendment to the Constitution:
gave women the right to vote

11.1.28 Androgyne:
the view that there are few differences between the sexes; it permits us to see that persons can be both aggressive and expressive, depending upon requirements of the situation.

11.1.29 Feminization of Poverty:

2 out of 3 adults classified poor are women; divorce, single-parenting, loss of husband, in transition . . .

11.1.30 Title IX:

11.1.30.1 schools must eliminate al sex-segregated classes and extracurricular activities (a la home ec & auto shop, PE exempt)

11.1.30.2 schools cannont discriminate by sex in admissions or financial aid and cannot inquire into whether an applicant is married, pregnant or a parent (single sex schools exempt)

11.1.30.3 schools must end sexist hirin and promotion practices among faculty members

11.1.30.4 although women do not have to be permitted to play on all-men's athletic teams, schools must provide more opportunities for women's sports, intramurally and extramurally.

11.1.31 Heidi Hartmann research re: percentage of housework: women do 70%, men 15% and children 15%

11.1.32 Tolbert on Black Americans not entering into the mainstream more than they have (several reason): key differences between blacks and other American racial/ethnic groups:

11.1.32.1 force immigration

11.1.32.2 based on color alone (easily identifiable)

11.1.32.3 The Significance of Slavery

11.1.33 tolbert re tension blacks and jews: Afro-American Historians on Africa: Themes fomr the African Diaspora

11.1.34 different organizations, are they pushing for assimilation & pluralism (NAACP,)?

11.1.35 Romo article: difference between rural and urban chicanos;

11.1.36 Smith: Politics of racial inequality---which white ethnic groups recieve a system of protection that helps them get ahead;

11.1.37 Coben: why minorities haven't melted into the melting pot;

11.1.38 Tobert re: black women in terms of forces that have negatively effected them since the 1970's;

11.1.39 short answer: identify two stradegies to break down intolerance in whatever institution;

11.1.40 three things to bring in more ethnic diversity in monolithic environment (100 persons of similar color) to bring in others.

11.2 EXAM IS ON WEDNESDAY AT FIVE PM!!!

Byte Feb 89 Note Bene p. 34 EC008

2/1 Anderson – Intercultural Social Psych
W 16:00 – 18:45 EC 8
Reginald Clark

* "developmental tasks": eg
patterns & learning
roles
values & attitudes: who am I? How do I think
up? / towards self & others is important.

→ achieve understanding – not agreement

→ material on the board = exam material

→ extra credit: pre approval – experience
& cultural significance 3 pp report.

Belief drives the Behavior –
get an understanding of our beliefs.
lectures distilled from Social Psych: Understanding Human Interaction, 4th ed.

3 main theories that drive class investigations

(1) Structural-Functional theory
understand interaction via Functional theory:
(the relationships in a way because it serves a certain purpose or function)
Status Quo theory - tries to justify the structure of relationships w/ the way things are/ought to be.

(2) conflict theory (Schaefer)
perception: scarce resources lead people to engage in competition for those resources - based on struggle for scarce resources

(3) Labelling Theory:
attitudes & behavior explained via analysis of how grps labeled/named each other over time
(self-fulfilling prophesy - tend to behave according to label)

SCANTRON

MINI BLUE BOOK

NAME Joe Bustillos

SUBJECT Huser 311

DATE 3-15-89

IMPORTANT

- USE NO. 2 PENCIL ONLY
- EXAMPLE: ⊏A⊐ ⊏B⊐ ■ ⊏D⊐ ⊏E⊐
- ERASE *COMPLETELY* TO CHANGE

TEST RECORD	
PART 1	11
PART 2	29
TOTAL	40

FORM 886

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SIX DYSFUNCTIONAL CONSEQUENCES OF DISCRIMINATION

(1) HUMAN RESOURCE IS NOT FULLY UTILIZED. When a particular group is not given full access to a given societys benefits then what might be gained from that group by the society is lost.

(2) THE MAJORITY MUST SUPPORT THE BURDEN OF KEEPING A MINORITY GROUP IN A SUBORDINATE POSITION. Taxes & time is lost by a society that uses its resources to curtail the involvement of a minority group from the mainstream

(3) THE INACCESSABILITY OF INFORMATION TO A SUBORDINATE GROUP HAMPERS THE ACCESSABILITY OF INFORMATION TO THE WHOLE GROUP. By

ETHNIC/PHYSICAL DIFFERENCES FROM THE MAINSTREAM GROUP: GREATER/LESSER?

(3) HOW RECENTLY DID THE MINORITY GROUP ARRIVE ON THE SCENE

(4) HOW RESISTENT IS THE MINORITY GROUP TO ASSIMILATION BY THE LARGE SOCIETY

(5) HOW MUCH COMPETITION FOR RESOURCES IS THERE BETWEEN THE MINORITY & MAJORITY GROUPS

(6) WHETHER THE MINORITY GROUP SETTLES INTO ONE SEGREGATED LOCATION.

PART 1

	(T) 1	(F) 2	3		5 KEY
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FEED THIS DIRECTION

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keeping full information away from minority groups information to the majority group is distorted & less able to fulfill its role in the society.

(4) IT IS EASY TO TRANSFER A PREJUDICE OF ANOTHER CONVENIENT MINORITY GROUP. In an atmosphere of allowed prejudice any minority group is at risk of "taking blame" for any number of social ills.

(5) PREJUDICE/DISCRIMINATION HAMPERS THE RELATIONS OF A SOCIETY TO THE COUNTRIES FROM WHICH IT MINORITY GROUPS HAVE EMMIGRATED. A country is less likely to have full relations with another country which mistreats its former citizens.

(6) DISCRIMINATION BREEDS CONTEMPT FOR LAW ENFORCEMENT BY DISCRIMINATED GROUP. The misapplication of law enforcement to discriminate against a minority causes the minority group to reject other perhaps just laws.

QUESTION TWO:

(1) WHAT PERCENTAGE THE MINORITY GROUP MAKES IN THE GIVEN SOCIETY

(2) THE NATURE OF THE MINORITY GROUP'S

ISSUE 11

SHOULD PUBLIC OFFICIALS BE ALLOWED TO SUE FOR LIBEL?

YES: Steven Brill, from "Redoing Libel Law," *The American Lawyer,* September 1984

NO: Anthony Lewis, from *"The New York Times v. Sullivan* Reconsidered: Time to Return to the Central Meaning of the First Amendment," *Columbia Law Review,* Number 603, 1983

ISSUE SUMMARY

YES: Legal authority Brill concludes that, with several modifications, the law can provide redress for public officials who are victims of malicious attacks by the press.

NO: First Amendment specialist Lewis argues that it was the intention of the First Amendment to provide the freedom to criticize public officials acting in their public capacity.

> Good name in man and woman, dear my lord,
> Is the immediate jewel of their souls:
> Who steals my purse steals trash—'tis something, nothing;
> 'Twas mine, 'tis his, and has been slave to thousands;
> But he that filches from me my good name
> Robs me of that which not enriches him
> And makes me poor indeed.
> —Shakespeare, *Othello,* act III, scene iii.

How much is your reputation worth? Are you concerned when someone says something about you that you think is untrue? In such a case, do you try to correct the misinformation, shrug it off as one of the misfortunes of life in the modern world, or consider filing a lawsuit? Libel is the publication of false and damaging information about somebody. Litigation in this area appears to be increasing and the sums of money involved in such cases have grown rapidly. In the past year, lawsuits by General William Westmoreland against CBS, Israeli General Ariel Sharon against *Time* magazine, and Mobil Oil president William Tavoulareas against the *Washington Post* have received widespread publicity. What has caused this seeming explosion in libel cases and is there any reason to discourage such suits?

As has been noted elsewhere in this book, one of the purposes of the First Amendment guarantee of freedom of speech and press is to encourage public debate about issues important to the society, particularly political issues. Free discussion of such matters is essential to a successful democratic system, since this is one way the will of the people becomes known to lawmakers. Recent libel cases involving large sums of money are of concern to the news media because they may cause some issues to go unreported, simply because of a fear of being sued.

In order to encourage the news media to report on important public policy issues and officials, more than twenty years ago the Supreme Court made it more difficult for political figures to win libel cases than for ordinary citizens. In the landmark case of *New York Times* v. *Sullivan,* 376 U.S. 254 (1964), the Court ruled that such individuals must prove that the libelous "statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." While ordinary citizens merely need to prove that the false statement made about them was made negligently, political figures have a much harder case to prove. The Court, through this ruling, assumed that it was helping the media to fulfill its role and was encouraging it to aggressively cover important people and issues.

It is interesting that the three big libel cases of 1985 did not turn out as most commentators had predicted. General Westmoreland dropped his suit after the trial had been going on for four months and the outlook for his winning the suit was not high. CBS did agree to issue a statement saying that it "respects General Westmoreland's long and faithful service to his country and never intended to assert, and does not believe, that General Westmoreland was unpatriotic or disloyal in performing his duties as he saw them." The Sharon case was decided by a jury which seemed to understand fully the complexities of libel law. It found that Sharon had been defamed, that the facts in the *Time* article were false, that *Time* had been negligent, but that it had not acted with malice and, therefore, that Sharon could not collect damages. The Tavoulareas case, in which the trial judge had overturned a jury verdict for the plaintiff, was subsequently reversed on appeal. That decision, which reinstated the jury verdict in Tavoulareas' favor, is not being appealed.

The recent flood of libel cases suggests to both of the authors in this chapter that the *Times* v. *Sullivan* standard needs changing. Steven Brill is willing to let public officials continue to sue to correct misinformation but wants limitations placed on the damages the plaintiff would receive. *New York Times* columnist Anthony Lewis suggests that society as a whole would be better off if political figures lost their right to sue for libel.

YES

Steven Brill

REDOING LIBEL LAW

Recently, the large Miami firm of Blackwell Walker Gray Powers Flick & Hoehl threatened to sue us for libel. We would win the case easily and when we did we'd no doubt hail it as vindication. Yet we did inaccurately defame one of that firm's partners with some sloppy reporting, albeit a single sentence in a short item.

On the other hand, some of the best journalism in this magazine and elsewhere is extremely vulnerable to costly libel suits—costly, that is, even if we win, with winning not at all assured lately and not even a good bet at the trial level.

That sums up where we are in libel law today: Bad journalism often wins gloriously; indeed, the names of some of the most famous (and for journalists the most rallying) libel cases are actually a roll call of embarrassing, negligent, or even venal misstatements made in print or on the air. Yet the best, most conscientious reporting is increasingly threatened; lately, plaintiffs are seeking tens of millions of dollars in damages and as often as not they're getting their cases to trial, where, even if they don't win, the cost of beating them is staggering.

American libel law—the underpinning of which is the 1964 *New York Times* v. *Sullivan* case in the Supreme Court—isn't working. Toward the end of this article, I propose what many in the press will view as radical and destructive changes in the entire framework of our libel law. But first, more on how *Sullivan* and the cases that followed have failed.

A pair of big name, big money trials coming up soon, each in federal court in the Southern District of New York, and each involving former top military commanders anxious to vindicate reputations sullied in unpopular wars, seem likely to illustrate the perverse evolution of libel jurisprudence in the 20 years since *Sullivan*. It seems likely that those two trials will see good reporting punished while a far sloppier variety is "vindicated."

From, "Redoing Libel Law," by Steven Brill, *The American Lawyer*, September 1984.
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One case pits former Israeli Defense Minister Ariel Sharon against *Time* magazine. Sharon is seeking $50 million. The other is the much-publicized $120-million suit by former U.S. General William Westmoreland against CBS.

In *Westmoreland*, the defense evidence gathered in pre-trial discovery suggests that the essential charge in a 1982 CBS documentary—that General Westmoreland and some of his subordinates presented lowball estimates of enemy troop strength—is simply supported by numerous military men and officials involved in the war who were not interviewed on the air and by firsthand accounts that CBS gathered and broadcast. Yet, as has been reported here and elsewhere, with help from a disgruntled former film editor and a hatchet man *TV Guide* reporter, CBS undercut the credibility of its people working on the show by way of a bend-over-backwards self-investigation following criticism of the show. Thus, with some prodding by Westmoreland's skillful, aggressive lawyer, the jury is likely to focus less on the plausibility of the facts alleged in the show by those interviewed on air and more on whether the tone and conclusion of the show were heavy-handed. These are mixed and judgment questions that the Supreme Court and the writers of the Constitution presumably felt were beyond the purview of popular judgment as expressed by a jury.

On the other hand, Sharon is likely to lose. This despite the fact that *Time* seems to have misstated the truth—or stretched the truth about what it knew—when the magazine wrote in its February 21, 1983, issue that "*Time* has learned" that a secret appendix to a report by an Israeli commission of inquiry concerning the slaughter in September 1982 of Palestinian refugee women and children by Phalangist militiamen contained "details" of a discussion Sharon allegedly had with Phalangist leaders prior to the killings about "the need for the Phalangists to take revenge for the assassination of [Phalangist leader] Bashir [Gemayel]." The simple fact, as we'll see below, is that *Time* can't have "learned" 18 months ago that the secret appendix says that because today, in defending Sharon's suit, its lawyers have conceded that neither they nor *Time*'s reporters know for sure that the appendix says that. Rather, *Time* was taking the word of a source whom it did not name that that's what the appendix said. But because Sharon won't be able to *prove* that *Time* deliberately lied or acted with reckless disregard for the truth concerning the substance of the report, his chances are minimal.

What Sharon faces is the "actual malice" standard articulated by the Supreme Court in the landmark *Sullivan* case. Actual malice, as defined by Justice Brennan for the majority, has nothing to do with ill will. It means, in the words of the famous decision, "with knowledge that it was false or with reckless disregard of whether it was false or not."

A public official, Brennan ruled, must prove that a defamatory statement that is false was made with that kind of "actual malice"—a tough standard for libel plaintiffs to meet.

But at the time it seemed altogether fair—considering the facts of the case: In 1960 a civil rights group had placed a fund-raising ad in *The New York Times*, with the headline "Heed Their Rising Voices." The ad said, among other things, that "Southern Violators" had harassed Dr. Martin Luther King, Jr., by arresting him seven times, had expelled some students who stood on the steps of the state capitol singing "My Country 'Tis Of Thee," and had padlocked a college dining room to starve students into submission. L.B.

Sullivan, a commissioner of the city of Montgomery who was in charge of the police, decided to sue. Neither Sullivan nor anyone else was named in the ad, but Sullivan maintained that the ad hurt his reputation. The mistakes Sullivan cited ranged from the trivial (the song they sang was the National Anthem) to the arguably non-trivial (the dining room doors had not been padlocked, though some students had been barred from eating there).

An all-white Alabama state court jury (convening in a segregated courtroom) awarded Sullivan $500,000 against the *Times*, and another jury awarded him $500,000 against the civil rights leaders whose names had appeared under the ad (but who had not seen its text prior to publication). As *Times* columnist Anthony Lewis wrote in an excellent retrospective on, and reevaluation of, *Sullivan* in the *Columbia Law Review* last year, "Seen from twenty years later, the case may look easy. A state libel rule that allows an official to recover large damages for . . . errors . . . in a publication that does not mention his name seems grotesque . . . [The] libel suit brought by Commissioner Sullivan was a weapon in a political struggle. . . ."

Sure, there were some mistakes in the ad (for which the courts have traditionally held both the person paying for the ad and the publisher responsible). But, as the Supreme Court, which also noted that only a few of the mistakes could be read as having anything to do with Sullivan, put it: "A rule compelling the critic of official conduct to guarantee the truth of all factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to . . . 'self-censorship'. . . . Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which 'steer far wider of the unlawful zone.'"

That all seems logical enough. So what's the problem?

Put simply, the framework the High Court tried to construct in *Sullivan*, which Lewis rightly observed had "the ring of a great occasion in the law," has collapsed in a maelstrom of litigation that rarely provides justice to either side and almost never results in the respect for law and guidance for lawful action that we look for in jurisprudence.

Statistics and examples to prove the point abound. According to an *amicus* brief filed last year by several publishing companies and television networks in a recent Supreme Court libel case involving a review by *Consumer Reports* of a stereo speaker system, since *Sullivan*, 70 percent of appeals by defendants in federal cases concerning rulings about actual malice have led to reversals by the courts of appeals, as compared to an overall court of appeals reversal rate of 19 percent. The culprit, then, would seem to be judges who don't apply the High Court's law. That's often true: In the *Consumer Reports* case, a federal district judge in Boston ruled, incredibly, that the publication's statement that the stereo's sound tended to wander about the room constituted actual malice because, in the judge's view, what the magazine should have said was that the sound wandered along the walls. The court of appeals's reversal of that ruling was recently upheld by the Supreme Court.

But the problem is much more complicated than mistaken judges. It also has to do with juries that are unwilling or unable to apply the "actual malice" standard and, above all, with what has turned out to be the impractical ambiguity, incompleteness, and inconsistency of the *Sullivan* doctrine itself, which can't be understood without a quick review of what's happened in the courts since:

How do you tell what the reporter knew or should have known in order to prove that he told a deliberate lie or recklessly disregarded the truth?

The answer would seem to be that the plaintiff has to have broad leeway to subpoena the reporter's notes and various drafts of the story and to get editors and sources to testify about what the reporter knew or was told. The media have resisted such inquiries, arguing that that kind of investigation compromised the independence of the editorial process and laid the press open to all kinds of second-guessing. Yet prohibiting such discovery presents the plaintiff with a Catch 22: He has to prove that the reporter knew something was wrong or feared that it might be wrong, but he can't find out what the reporter knew or what he discussed with his editor. The Supreme Court said no dice in 1979 in *Herbert* v. *Lando*, the case of another CBS documentary; and today most media defense lawyers will concede privately that the position argued in that case was untenable. As a result, any libel case worth its salt involving public figures or possible public figures now begins with months or years of burrowing discovery, in which the plaintiff tries to find out everything conceivable about everything—interviews, notes, even the thought process—that preceded the offending story.

Who's a public figure?

In *Sullivan*, the court limited the actual malice defense to "public officials," but in two 1967 cases—one involving Georgia football coach Wally Butts, the other a family taken captive in a highly publicized incident, the court broadened the category to include all "public *figures*." Public figures were defined, in the hostages' case, as persons "expose[d] . . . to public view." Then, in 1974, the court pulled back, ruling that Elmer Gertz, a prominent civil rights lawyer in Chicago, could recover damages from a John Birch Society publication without proving actual malice. Gertz, the court said, had not talked to the press or sought publicity in his handling of the controversy (a suit charging a police officer with murder) that the Birchers' magazine was writing about.

Two years later, after *Time* had reported that a Florida judge had given Russell Firestone (of the tire family) a divorce because of his wife's adultery and extreme cruelty—when in fact the decree never mentioned adultery or cruelty (see what I mean about sloppy reporting making great cases)—the Supreme Court declared that although Mrs. Firestone had held a press conference concerning her divorce, she, too, was not a public figure. The court said that, yes, it had noted that had Gertz sought publicity in a public controversy, he might have been deemed a public figure. But "dissolution of a marriage through judicial proceedings is not the sort of 'public controversy' referred to in *Gertz*."

What *is* the right sort of public controversy? And suppose there is a public controversy of "the sort" the court approves but the key figure hasn't sought publicity. For example, takeover/greenmail artist Saul Steinberg shuns all publicity. Is he a public figure for the purpose of an article about greenmail? The law is unclear on this, though it seems to lean toward his being a public figure because he has become a generally prominent, especially among business people. But does that mean you wouldn't be a public figure in a publication that didn't have an audience of business people?

What's a "fact" and what's an opinion?

Put differently, what is susceptible to being proven false? In *Gertz* the court noted, to the everlasting relief of media defendants, that "there is no such thing as a false idea"—meaning that statements of opinion are always fully protected from libel suits. That's because the underpinning of democracy, the courts have consistently found, is the "marketplace of ideas," and juries or other instruments of popular will should not be used to punish unpopular ideas or opinions.

That sounds good, but what about a restaurant review (obvious opinion, it would seem) that declares that all the food was cold or that the fish was rotten, or that, as in one 1977 case, one dish could best be described as "yellow death on duck." Suppose the restaurant owners claim that the food isn't always cold, that the fish is fresh, and that the duck sauce isn't even yellow? Such cases have come out both ways in recent years.

Similarly, a case recently reheard by the entire court of appeals for the District of Columbia involves an Evans and Novak column that said that a Marxist professor up for a department chairmanship represented a threat to academic freedom because he was "widely viewed in his profession as a political activist." The first time around in the court of appeals Chief Judge Spottswood Robinson III grappled gamely, and quite creatively, with the problem by defining certain speech as representing a "hybrid" of fact and opinion in which the facts upon which the opinion is based must be presented fully and accurately in order for the opinion to be protected. Thus, the professor had better be a Marxist and had better be "widely viewed" as an activist.

But, separating fact from opinion, even if the purpose is to call a statement a hybrid of each, isn't that easy. Isn't "cold" food a matter of taste? (Imagine the dilemma if the reviewer had said "lukewarm" or "overspiced"?) And what's the definition of Marxist (or "leftist"), let alone "activist"?

In the *CBS* case, Westmoreland's main complaint is that CBS charged him with a "conspiracy" to cover up real enemy troop strength. What's a conspiracy? Is that CBS's interpretative, descriptive conclusion of what the network's reporters believe the general did based on the information that it gathered and presented in the broadcast, or is that a statement of fact that the general committed a criminal conspiracy?

I'd be inclined to say that our yearning for a free, vigorous marketplace of ideas requires that all conceivable interpretations of fact be protected. But consider the 1971 Supreme Court case of *Time* v. *Pape*, in which *Time*, writing about a U.S. Civil Rights Commission's report on police brutality, said that "the report cites Chicago police treatment of Negro James Monroe," and then went on to quote what seemed to be the report's detailed description of horrible police misconduct. That description was prefaced by the comment that the facts in the report "were carefully investigated by field agents and it was signed by all six of the noted educators who comprise the commission."

In fact, the report made it clear that it was only describing the *alleged* facts set out in a suit, then pending, that had been filed charging the Chicago police, including a deputy chief of detectives named Pape, with brutality. When Pape (who was named in the *Time* article) sued, the Supreme Court ruled that "*Time's* omission of the word 'alleged' amounted to the adoption of one of a number of possible rational interpretations of a document that bristled with ambiguities."

Self-respecting journalists should cringe at the need for protection of such sloppy reporting.

What about reporting other people's libels?

It has always been the law that one who repeats another person's libel is just as responsible as the person making the original statement. In theory, then, if President Reagan were to say that "Walter Mondale passed secrets to the Russians while he was vice-president," and Dan Rather knew the statement to be false or seriously doubted that it was true, he couldn't report it on the evening news because to do so would be to broadcast a defamatory falsehood with "actual malice." In 1977 the Second Circuit court of appeals (in New York) found a way out of that by coming up with the doctrine of "neutral reportage." *The New York Times*, ruled Judge Irving Kaufman, was protected from a libel suit for its reporting that officials of the National Audubon Society had accused some scientists who opposed the society on various issues of being "paid liars," because "when a responsible, prominent organization like the National Audubon Society makes serious charges against a public figure, the First Amendment protects the accurate and disinterested reporting of these charges, regardless of the reporter's private views regarding their validity. . . . What is newsworthy about these accusations is that they were made," Judge Kaufman added.

Yet the Second Circuit's view, while adopted by some courts elsewhere, has been ignored or rejected in more courts, and the Supreme Court has never addressed the question.

Besides, who, under Judge Kaufman's rule, decides what a "responsible party" is? To take one extreme, what if the party making the charge is notoriously irresponsible but newsworthy, such as Patty Hearst calling her father all sorts of names when she was in captivity?

What's the fault standard for nonpublic figure plaintiffs?

There is no settled law on how wrong and how careless a publication or any other defendant must be to be held responsible for wrongly defaming private people, except that the Supreme Court has said that the publication must be something more than simply wrong—such as negligent. Negligence, of course, usually means the care taken by a reasonably prudent man. What's that mean in this context? Should CBS or *Time* be held to a higher standard than *The American Lawyer* because they reach so many more people and have more money to hire more researchers and reporters? What about a story about a divorce decree? Shouldn't *The American Lawyer* be held to a higher standard than the other two because it purports to be in the business of writing about complex legal issues? Should magazines that have fact-checking staffs be held to a higher standard than those that don't, thereby penalizing these more careful publications?

None of these are law school hypotheticals. All have been played out, with alarmingly confusing and unconstructive results in our courtrooms lately.

The best example is the case of Mobil Oil Company president William Tavoulareas and his son Peter against *The Washington Post*. In an article headlined "Mobil Chief Sets Up Son In Venture," the *Post* charged on November 30, 1979, that the Mobil president had improperly "set up" his son in the oil shipping business by diverting Mobil shipping business to him. Two years ago, I wrote a long article about that case and the jury's deliberations in this magazine, the major points of which were:

- The article was accurate, with some

minor exceptions, but that its headline and lead sentence were, to the Tavoulareases' detriment, more conclusory than what I would have written, based on the evidence reported in the article itself.

• The jury fixed on a memo written by a junior *Post* copy editor concerning an initial draft of the story, in which she complained that the story wasn't convincing. It didn't matter to the jury, according to the jurors I interviewed, that the copy editor wasn't expert on the subject matter.

• The jury also paid a great deal of attention to some less-than-admirable journalistic attitudes and techniques that went into the story. (For example, the reporter had remarked to a free-lance helper that it would be great to "knock off" a seven sister oil company, and the free-lancer secretly taped a phone conversation with a source.)

• The jury disregarded Judge Oliver Gasch's instruction (in the middle of two hours' worth of instructions) about the burden of proof being on the plaintiffs to prove not only falsity but reckless disregard for the truth. Instead, the jurors examined whether the *Post* had proven everything in the article to be true and used some of the material in the article itself (call it the neutral reportage material) to decide that not everything had been proved and that, therefore, the article wasn't fair because its headline and lead sentence had been overdone. This jury's reaction, says Floyd Abrams of New York's Cahill Gordon & Reindel, the First Amendment specialist who has represented the *Times*, NBC, and several other media entities (including this magazine), is part of a pattern that fits other jury verdicts that the courts have overturned. "The actual malice standard seems to go against common sense," he explains. "The Bill of Rights is counter-intuitive. But jurors are intuitive. And they intuitively think they're there in a libel case to decide if a publication or network has been fair to a plaintiff."

In the end, the jury's $2.05-million verdict against the *Post* was overturned by Judge Gasch, who never should have sent the case to them in the first place. The plaintiff's appeal is awaiting a court of appeals decision.

Assuming Gasch's decision is upheld, who will have gotten what from the *Post* trial? The *Post* and Tavoulareas will have, by their own accounts, spent millions each litigating the public figure question, fighting over summary judgment on the actual malice issue, trying the case, and fighting the appeal of the overturning of the jury verdict (just as they would have fought the appeal had the verdict not been overturned).

Post executive editor Benjamin Bradlee was quoted in his own paper and elsewhere after Gasch overturned the verdict as saying, "We're delighted that our reporting was vindicated." Given that the decision he's referring to was Gasch's and Gasch's alone, and that Gasch had first noted (wrongly, I think) that the article "falls far short of being a model of fair, unbiased investigative journalism" but that there simply hadn't been evidence of actual malice, that's a bit like Mr. Miranda saying he was delighted that his reputation for honesty and integrity had been vindicated.

Which brings up an important point. Libel suits, especially those claiming millions of dollars, tend to cause people at the offending publication to hunker down and adopt a we-versus-them attitude that leaves little room for self-examination concerning the possible imperfections of what was written. Indeed, it's dangerous to the litigation for too many postmortem questions to be asked, let alone for an erring reporter to be reprimanded. And when the case is won on some constitutional ground (we'd call it a "technicality" if it were a criminal case), the publication and its editor or reporters, like the *Post* and Bradlee, usually claim to have been "vindicated."

Similarly, the fact that the copy editor's memo caused the *Post* so much trouble with the jury can't help but chill future memo writers or, for that matter, editors or broadcast producers who would otherwise encourage prior internal debate about articles. Indeed, the actual malice standard, with its search for a publication's doubts about the truth or falsity of something, almost invites doubters to keep their comments to themselves and managements to scuttle doubt-raising mechanisms such as a fact-checking staff.

I suspect that the *Westmoreland* case will be a near replica of the Tavoulareas drama, assuming that federal district court judge Pierre Leval makes the same initial mistake and lets it get to a jury. The jury will fix on the use of the word conspiracy much the way the *Post* jury fixed on the conspiracy headline, while also making much of how the CBS production team allegedly committed scattered violations of the network's ethical guidelines for reporting techniques. In that context, an internal CBS investigation that revealed the guideline violations will mirror the role played by the memo from the *Post* copy editor. And the defense, led by David Boies of Cravath, Swaine & Moore, seems bent on making *Post* lawyer Irving Younger's mistake of blaming the client and taking the most adversarial approach by arguing the total truth of the broadcast, disregarding the probability that this jury, like the one in the *Post*, will ignore the actual malice law and focus on whether CBS has "proved" that its interpretative conspiracy headline was accurate, and then, as Abrams puts it, do "what they intuitively think is fair."

So what we're likely to see is a verdict against CBS with CBS winning the appeal—in short, millions of dollars and [illegible] of man-years of depositions spent on nothing. Unless, of course, the judge refuses to send the case to the jury on the grounds that CBS did, indeed, accurately present real interviews with real officials involved in the war, who made their charges as broadcast, and that CBS's interpretations and conclusions having to do with what the interviewees said, however fair or unfair, is opinion protected by the First Amendment. Whereupon CBS will save money on its appeal.

On the other hand, from the standpoint of correcting bad journalism (and not providing a "vindication" far more absurd than the one dreamed up by Bradlee), Sharon ought to win his case against *Time* (which is also being defended by Cravath). Yet he's far less likely even to get to a jury.

"We intend to prove that Sharon provoked the massacre and that he's killed an awful lot of people in his day," says Cravath's Thomas Barr, who as the general in Cravath's celebrated IBM bet-your-company defense in the government's antitrust suit is perfectly cast to make this the kind of fight-to-the death, multimillion-dollar, multi-year campaign all libel suits have become.

Was that material in the appendix?

"We don't know for sure," says Barr's co-counsel, Cravath partner Stuart Gold. But, he adds, "It's up to Sharon to prove that it's not in the appendix." What about the fact that the appendix is being kept secret by the Israeli government? "That's his problem." Then couldn't *Time* have said with impunity that anyone at all was written about in the appendix as having caused the massacre?" A responsible organization wouldn't do that," Gold replies.

Why would a responsible organization say it "has learned" that something is in report when it can't have "learned" because it doesn't know it and because

seems not to be true? (If it were true, it seems implausible that Sharon would sue.) Why couldn't *Time* have told the truth and said "*Time* has been told by a usually reliable source that . . . is contained in the secret report, but this could not be verified because we have not seen the report." And why isn't our libel law formulated to encourage that truth?

As the law now stands it seems likely that Sharon will see his case dismissed before trial when he tells federal judge Abraham Sofaer that he can't produce the report because it's secret, or when Sharon can't answer questions relating to Israeli national security matters. Or, he may do a bit better if the judge tells *Time* that it cannot cite its secret (and apparently incorrect) source for its declarative statement about what was in the secret appendix unless it tells him and the jury who the source is. (The New York State "shield law" that seemingly shields reporters' sources from libel suits probably doesn't apply to a source relationship situated in Israel or Lebanon, and even if it does, the law apparently allows the judge at least to tell the jury it is allowed to disregard the possibility of a source if the defendant won't come forward with information about who the source is.) In that case Sofaer may persuade the parties that they're both risking too much in front of the jury, whereupon Sharon may settle for an apology from *Time*, in which the magazine will write that it turns out that its information about the appendix cannot be substantiated.

For me, the difference between the *Time* and CBS cases is fundamental. CBS involves a dispute over interviews with people ("responsible" people, if one wants to use Judge Kaufman's standard) who said that Westmoreland and others misled the White House and the rest of us about the progress of the war in Vietnam—just the type of charge open to interpretation that encourages the kind of debate we cherish. The *Sharon* case involves what I often tell my staff is a "physical fact"—something that is either true or not true and can either be checked out beyond a reasonable doubt or should be acknowledged as not having been able to be checked. Does the appendix say what *Time* said it had "learned" it said, or not? If *Time* wasn't sure, it should have said so—period. There really can be no room for error here, just as there shouldn't be room for error in a publication's reading of a divorce decree. . . .

Why am I criticizing a legal framework that would get us out of a libel suit? Because I'd gladly trade it for one that might, as I'll explain, make us liable (for a small amount) in this case in exchange for one that would have spared us the expense of defending the five libel suits we've *successfully* defended—and which did not involve inaccuracies—since we started publication.

We need a new framework, based on new legislation (that could probably be enacted at the federal level only if we also legislate federal jurisdiction for all such cases) that will do the job the court hoped to do in *Sullivan*. At the root of that new framework should be a recognition of the difference between fact and opinion, or even interpretations of fact, as well as a realization that in any speech situation two current threats—unreasonably high damage awards and high litigation costs—create the self-censorship the court was trying to ward off.

Of course, constitutional rights, such as those established by *Sullivan*, can't be overruled by a legislature; that's what the Bill of Rights and judicial review of legislative acts are all about. But the following steps taken together—and only if taken together—might pass consitutional muster as balancing the competing interests of free expression and an individual's right to his reputation. Indeed, I'd bet these changes would be welcomed by a Supreme Court (this one or a newly constituted one, be it more liberal or more conservative) that knows that the *Sullivan* framework is protecting neither the First Amendment nor the rights of plaintiffs to redeem their reputations.

Here, then, is what we ought to do:

1. End the actual malice defense and all else that attempts to divide public and private figures:

It's too confusing; jurors ignore it; and it unnecessarily protects bad journalism, be it the *National Enquirer* or *Time*.

In his *Columbia Law Review* article, which also argued for a revamping of the libel framework in light of the failure of the *Sullivan* case and its progeny to work effectively, Anthony Lewis took a different tack, urging that a public figure by anyone who meets two tests—prominence in the community and the relevance to public affairs of what has been written about him. It's an appealing idea, but I don't think it does enough to help maligned public figures in many instances. Besides, it's unnecessarily complicated and ambiguous compared to what I'm about to suggest. The focus of a court's discretion, I believe, ought not to be on the plaintiff or the subject matter but on the nature of the speech and whether it is communication of fact or the expression of ideas, as follows:

2. Adopt a strict, narrow interpretation of what constitutes a "fact" that can be proven false:

Anything that cannot be proven false beyond a reasonable doubt should get the protection given by the Supreme Court to opinion. This makes things simpler and protects the freedom of "expression" that is the core of the First Amendment (though I concede that I haven't yet figured out whether "cold soup" is a fact or opinion). The point, however, is that libel law ought to go after *misreporting* that hurts someone's reputation, not unfair reporting. Misreporting means misstating the facts. Unfair reporting means forming and stating opinions, interpretations, and conclusions that people can debate about. The simple—and for some would-be plantiffs—harsh reality is that our constitutional values put a premium on that debate, even at the expense of somone's reputation. Put differently, there are some wrongs our legal system can't right and shouldn't try to right and one of these is the expression of outrageous, even vicious opinions.

3. Make the neutral reporting defense a natural extension of this strict "fact" requirement:

That is, make the existence of someone else's accusation a reportable "fact" with the test for accuracy being not the substance behind the charge (Is Mondale a traitor?) but the existence of the accusation and its accuser. (Did President Reagan say it, or did he say something else, or did someone else say it?)

The obvious criticism of this near-blanket neutral reportage protection is that it allows the free repetition of libels. There are two answers to that. First, the victim could sue the libeler. Second, and most important, this kind of rule is thoroughly consistent with the marketplace of ideas/free debate values that inspired the First Amendment. By requiring that publications be factual about how it is that they think they know what they think they know, we would be providing readers, or listeners, the best possible information with which to evaluate what they read or hear. Thus, a newspaper would be free to print that a mental patient who has never met the mayor has accused

the mayor of being a rapist, or that the mayor's secretary has accused him of being a rapist (though one would assume that the paper would not find the mental patient's charge newsworthy). A reader could make his own decision about whether either charge seems believable.

This kind of rule also has the practical effect of allowing more unfettered discussion of "public" people without running into the quagmire of defining who they are; for public people are more likely to be talked about by others.

Does this mean that the media would always be "hiding behind" some source? Sure. But in reporting facts that's just what we want the media to do—have a source for what it doesn't or can't know firsthand.

4. Do not give neutral reportage protection for allegations using anonymous sources unless the publication is willing to name the source at trial or unless the allegation is not checkable and the publication is willing to tell the judge privately who the source is:

This is necessary for two reasons. First, to allow a publication to say that an anonymous source's account of something is itself news and therefore worthy of the neutral reportage protection would allow any publication to hide behind an anonymous source in saying anything. Second, the decision that an anonymous source saying something is newsworthy is so subjective that it is not neutral.

Under this rule, any statement attributed to an anonymous source would have to be proved as true unless the source was revealed. Such a rule would be no loss for media defendants lately anyway, since, as discussed, even shield laws don't give them an effective defense when citing confidential sources. The exception would be an allegation that is not checkable, even by way of the subpoena and civil trial process. In those situations if a judge, to whom the source would have to be revealed in camera and ex parte, decides that the description of the source was accurate, the statement would be protected.

Here's how this rule would work in the hypotheticals:

I. "A source in the prosecutor's office says Governor Jones is under investigation by a grand jury." If the source were not revealed, the publication would have to prove the substance of the report—which, if true, it could presumably do easily by subpoenaing prosecutors and their records (in camera if necessary). (Of course, the burden of proof is technically on the governor, but if he took the stand and said he was not under investigation, it would probably shift to the defense.)

II. The *Time/Sharon* case: If *Time* had reported that "a usually reliable source whom we won't name says that . . . is in the appendix," the magazine could submit its source to the judge, assuming the appendix remains secret and therefore uncheckable, and the judge could rule on whether the description of the source is accurate. If so, *Time* would receive neutral reportage protection. However, *Time* would not be protected if it reported, as it did, that "Time has learned"—because that's not true. The difference is important. In the first statement the reader knows that *Time* doesn't know for sure and can weigh in his own mind whether he wants to believe that the material is in the appendix just because some source who insists on remaining anonymous says it is.

III. "A source says that Smith was tried and convicted on three counts of rape." This would not be protected as neutral reportage, since it is easily checkable. It also is lousy writing and reporting. If it is true, the publication ought to be able to check it and either state it declaratively or else write, "According to prosecutor Jones, Smith was tried and convicted. . . ."—which is much more convincing to a reader anyway.

5. Whether in writing about public or private figures, establish near-strict liability for damaging factual inaccuracy and allow the jury to consider the publication's own claims in advertisements about its standards for accuracy in judging whether it was negligent and should be held responsible:

I'm tempted here to argue for a standard of strict liability—that is, make a publication responsible for any damaging inaccuracy. But some negligence—some departure from reasonable care—ought to be proved in order to avoid the situation in which, for example, a clerk mistakenly sends a newspaper a draft of a judge's opinion instead of the final version and the draft contains a far harsher characterization of a litigant.

However, in considering what standard a publication should be held to, the plaintiff ought to be able to introduce any direct-mail letter or solicitation of subscriptions or advertising touting the publication's high standard of accuracy.

6. Allow the offending publication to prevent a possible suit by printing a prompt, prominent correction:

Before a plaintiff could sue, he would have to present his grievance to the potential defendant, whereupon the defendant could head off a cause of action by printing a correction in as prominent a place as the mistake was printed. Our goal, it should be remembered, is to restore reputations, not punish publications. Punishment clearly is at odds with the First Amendment. But nibbling away at a publication's credibility by having it print prominent, embarrassing corrections, seems perfectly in keeping with the "marketplace of ideas" concept. With this in mind, if this means a newspaper would have to change its usual [illegible] print a correction on page one, so be it.

7. Set damages if a suit goes forward to actual pecuniary loss plus a limit of three times the cost of a full-page ad in the offending newspaper or magazine for compensatory damages such as pain and suffering, with no punitive damages allowed:

Lewis points out correctly that punitive damages mean that the state, via a jury, is punishing speech, something which the First Amendment seems to prohibit. Similarly, damages for nonpecuniary loss, such as pain and suffering, are so much based on intangibles that, again, the jury may simply be rendering punitive judgment. Thus, Lewis argues that all damage awards should be limited to proved injury measured by financial loss. I don't think that goes far enough to compensate plaintiffs for the loss to their reputation or the worry over such loss that comes from publication of a defamatory false fact.

But I do have a way to go further without opening the door to damage awards that would cripple publications or the broadcast media, especially those that aren't rich. It's based on the idea that the best judge of the value, or cost, of exposure in a given medium is that medium itself—as expressed in how much it charges for a unit of advertising. Here's how the damages limitation formula would work:

If *The New York Times* loses a libel suit for publishing a damaging false fact, the plaintiff would be *limited* to recovering, for all the libelous inaccurate statements in the article, actual financial loss (usually nothing but perhaps a proven medical bill from having developed an ulcer, or lost income due to being fired), plus three times the cost of a one-page ad in the section of the paper that the false item appeared. Similarly, NBC would have to pay three times the

cost of two minutes of advertising on the show that the libel was broadcast on. (Two minutes seems to make sense as the broadcast equivalent to a page, but perhaps it should be more.) A local TV station would pay three times its lower two-minute rates, while *The American Lawyer* would pay three times its lower-than-the-*Times* page rate.

The presumption would be that the successful plaintiff, if he got the maximum damages, would use one third of his award—that is, a page in the *Times*—to advertise what the jury had found in his case. For this reason, all juries would be asked to declare their findings in addition to declaring a verdict and an award. For example, in the *Sharon* case, Sharon might spend a third of his winnings (he could spend all three thirds if he wanted) to advertise, "A jury has declared that *Time*'s report that it had learned . . . was untrue."

The bottom line is that a *New York Times* libel would net a plaintiff at most $92,088, plus any real financial loss (the highest-priced page in the *Times* costs $30,696). A libel in *The American Lawyer* would net a maximum of about $9,000. In both cases the offending publication might get back a third of the award—in the form of payment for a full-page ad. It should be noted that I do not consider the remaining two thirds to be punitive damages, but, rather, compensatory damages—compensation, that is, for the intangible pain and suffering the plaintiff experienced in the interim between when the defamatory statement appeared and when he had a chance to correct it with his ad. I am simply using this two-times-the-cost-of-an-ad payment as a yardstick (a rational one, I think, given that it's based on the publication's or broadcaster's own sense of the value of its medium) to determine these pain and suffering damages. This provides some measure of fairness while avoiding the possibility (which today is a reality) of a jury punishing a defendant by assessing millions of dollars to cover these intangible damages. It should also be noted that this three-times-one-page formula is a maximum. A minor error would not result in this award.

Because the Constitution seems, appropriately, to prohibit the state, and, therefore a court, from forcing anyone to publish or broadcast anything, the offending paper would have the option of refusing the ad. But if it did, the jury (or the judge if the jury has been dismissed) would then be allowed to award damages equal to three times the cost of the winning plaintiff's effort to reach all of the losing defendant's readers or viewers by some other means. For example, if, to reach all *New York Times* readers it takes three ads in the *Wall Street Journal*, four billboards, an ad in *The New Yorker*, and two local TV ads, the *Times* would have to pay three times the cost, which, of course, would encourage the paper to allow the ad. Again, for the offending publication to have to accept the ad or else pay the cost of reaching people by alternative media, the ad could say no more than the jury's finding—as presented to them in proposed findings by the judge following a verdict. This means that the plaintiff who gets a lukewarm verdict—that he's a convicted burglar not an armed robber—might rather take his winnings (obviously not the maximum in such a case) and go home without advertising. (Or he might not sue in the first place, or he might get a fast settlement.)

One other wrinkle: If the defamatory statement ran on the newspaper's front page it would be impossible to have the newspaper run a full-page ad on that page. In this situation I'd say, arbitrarily, that the damages would be tripled—that is, they would amount to nine times the cost of an ad in the first section—in order to give the plaintiff the opportunity to advertise three times instead of once, plus keep three times the compensatory damages.

What about newsletters or other publications that don't take advertising at all? They'd either have to make an exception and run a one-page ad at a cost equal to the profit derived from one issue divided by the number of pages (and pay twice that cost to the plaintiff as compensatory damages) or pay three times the plaintiff's cost of reaching their readers some other way. As for pamphleteers, speakers in a meeting room, or others who do not get paid for their words, damages paid by them would be limited to actual financial loss. The reasoning here, in addition to being practical, seems to be consistent with the First Amendment's goal of a broad, open exchange of ideas. After all, the speech most vulnerable to chilling from paying a financial cost for speaking is speech which is done for free. (Note: this would not exempt magazines that claim tax-exempt, nonprofit status, or media that simply haven't succeeded in being profitable; only speakers that charge nothing in the way of advertising or reader payments would be exempt.)

Because books can't carry ads in a next edition, the plaintiff would be entitled to three times the real cost of reaching a book's purchasers and readers through ads in book reviews, display racks in bookstores, and the like, with the book publisher allowed to submit such a corrective advertising campaign to the court and with total damages limited in any event to the book's real profit to the publisher and author. If this seems unduly harsh on book publishers, it ought to be remembered that most books have no special deadlines and, thus, should be able to take extra care to be accurate. Besides, this is still far preferable to publishers paying a six or seven figure award for a misstatement of fact in a book that sells 10,000 copies. Moreover, these awards would not have to be given out willy-nilly to avoid the cost of litigation because of rule #8:

8. In all libel cases, the "English Rule" would apply: the loser would pay the winner's reasonable legal costs.

I'd gladly trade this rule alone for all the protections given publications under *Sullivan* and its succeeding cases. And it makes sense: A harassing libel case is a tax by the state (via its court system) on speech. Conversely, rich media defendants can now litigate by attrition rather than admit a factual mistake. Under this rule, they'd have to be more careful.

Especially in light of our damage limits described above, this rule would encourage settlements. Indeed, as a corollary to this rule, we might provide that before the start of formal litigation, but presumably after the potential defendant has refused a request for a correction to be made editorially, and perhaps once again just before a trial following discovery, the defendant could submit a settlement offer to the plaintiff spelling out both the damages to be paid (easy to calculate given our new proposed limits) and the corrective finding of fact to be acknowledged. If the offer is rejected, the judge could then decide whether the verdict, if it is in favor of the plaintiff, goes further in both regards than the defendant was willing to settle for. If it doesn't, the judge could rule that not only is the "losing" defendant exempt from paying the other side's legal costs but the plaintiff has to pay the defendant's post-settlement offer costs.

To see how this system would work, let's examine what would happen in the case of our inaccurate piece about Anania of Black well Walker. Assuming that we hadn't acted so quickly to correct our dum

mistake (which under the new framework would eliminate a suit), we'd be liable at most for three times the cost of a one-page ad in this magazine—a total of about $9,000. And the decree would probably say that we had misread the judge's order, etc. The record would have been corrected; we'd be appropriately embarrassed; and Anania would have $6,000 to spend on a vacation somewhere. There would be no claims for millions in damages on his side and no throwing down the First Amendment gauntlet on ours. (In fact, the damages would probably be less because the truth—that the judge had fined him $10,000 for obstruction of discovery and had referred him to a grievance panel to investigate whether he destroyed documents—is arguably not much more negative than what we wrote.)

Recently New York's highest state court, applying a *Sullivan*-like rule, unanimously decided that because news articles of "legitimate public concern" must be "grossly irresponsible" to be held liable for defamatory mistakes, a *New York Daily News* article on the plight of patients in mental hospitals that grievously maligned a private person was protected. The *News* had reported that "George Niles . . . suffered a nervous breakdown that psychiatrists said was precipitated by a messy divorce and the fact that his son killed himself because his mother dated other men." But Niles's former wife was not allowed to proceed with her suit despite the fact, according to subsequent court filings, that Niles had been hospitalized for alcoholism rather than a nervous breakdown, that the divorce had not been "messy," and that the wife did not date other men and her son had died of a methadone overdose.

It turned out that reporter Marcia Kramer had relied on the husband's sister for the information because the psychiatrist who had treated the husband refused to talk. What Kramer, a highly regarded and usually careful reporter, should have done was attribute the information to the husband's sister instead of "psychiatrists," or track down the wife. (Had she attributed the information to the sister, or for that matter to a psychiatrist, a good editor would have asked her to get comment from the wife anyway.) In my new scheme of things, the wife would collect three times the cost of a full-page ad in the *Daily News* where she could probably, if she wished, run an ad correcting the facts.

The point is not that Kramer or the *News* should be pilloried but that the legal environment in which this battle was played out should have been such that they could have been able to admit a mistake (rather than throw down a constitutional gauntlet), learn from it, compensate their victim and restore her reputation, and go on with their work. . . .

I should admit that my personal philosophy is more purist: I believe the First Amendment precludes all libel suits. But I'm also a purist about what journalism ought to do and aspire to, and I can see that the current system of life or death, winner-take-all combat does little to deter sloppy journalism and much to threaten the better variety, while offering scant scattershot protection to real victims of a bad press. That's not what the majority in *Sullivan* intended, and it's not what well-intentioned plaintiffs or defendants should want.

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Anthony Lewis

NEW YORK TIMES v. *SULLIVAN* RECONSIDERED: TIME TO RETURN TO "THE CENTRAL MEANING OF THE FIRST AMENDMENT"

. . . In *New York Times v. Sullivan*[1] the Court held for the first time that an award of damages for libel violated the freedoms of speech and press guaranteed by the First Amendment. The decision had from the first the ring of a great occasion in the law, sensed not only in the result but in the bold sweep of the Court's opinion, by Justice Brennan. . . .

This is an appropriate time to think again about that great case. It is a time of growing libel litigation, of enormous judgments and enormous costs. The press and its lawyers are deeply worried; the protection that they thought was won for free expression in *New York Times v. Sullivan* seems to them to be crumbling. Some would say that libel actions are a more serious threat than ever. Now the American press is addicted to self-pity. Although it is the freest in the world, and freer now than it ever has been, it often cries that doom is at hand. But this time even someone as skeptical of press claims as I am must admit that there is something to the concern. . . .

The *New York Times* had carried an advertisement under the headline "Heed Their Rising Voices." It was what would be called message advertising: an exhortation on behalf of the civil rights movement in the South and especially of its leading figure, Dr. Martin Luther King, Jr., then a minister in Montgomery, Alabama. It said that "Southern violators" had hounded Dr. King, arrested him seven times, persecuted black students after they stood on the steps of the State Capitol in Montgomery and sang "My Country, 'Tis of Thee." Mr. Sullivan was an elected commissioner of Montgomery, in general charge of the police; although he was not named in the advertisement—no one was criticized by name—he claimed that it reflected on him. He also showed that there were factual mistakes in the text: Dr. King had been arrested only four times, for example, not seven; the students on the Capitol steps had sung not "My Country, 'Tis of Thee" but the National Anthem, and the students' dining hall had never been padlocked, as the advertisment said, "in an attempt to starve them into submission." Mr.

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Sullivan sued for $500,000, an Alabama jury awarded him that amount, and the state supreme court affirmed. Other Montgomery officials and the Governor of Alabama had also sued over the advertisement, asking for another $2.5 million, and there was every reason to think that they would get all they sought. That was where things stood when review was sought in the United States Supreme Court.

Seen from twenty years later, the case may look easy. A state libel rule that allows an official to recover large damages for trivial errors of fact in a publication that does not mention his name seems grotesque. But the *New York Times* was far from confident of victory in 1962. The very existence of any question for the Supreme Court to review was in doubt: any question, that is, of federal constitutional law. The Court had gone for 170 years without finding in the first amendment any limits on libel judgments, however tenuous their logical bases or outlandish the amount of damages awarded. . . . Were *Times* executives worried? A former vice president and general counsel of the paper said recently of the jury verdicts in the *Sullivan* case and other libel cases of that time in Alabama: "Without a reversal of these verdicts, there was a reasonable question of whether the *Times*, then wracked by strikes and small profits, would survive."

What was at stake on the facts of the *Sullivan* case was more than the fate of one newspaper. It was the ability, or the willingness, of the American press to go on covering the racial conflict in the South as it had been doing. Those were very different times in Alabama and Mississippi and large parts of other states in the Deep South: Blacks could not vote, much less attend school or eat a restaurant meal or ride a bus on a nonracial basis. To challenge the racial system was dangerous; physical violence and threats were common. The national press, print and broadcast, played an extremely important part in bringing all this to the attention of the rest of the country, in arousing the federal government to corrective action and hence in changing the ways of the South.[2] Of course those who wished to preserve what was then called "the Southern way of life" did not like the press when it intruded into that life. Justice Black, who was from Alabama, observed in his concurring opinion in the *Sullivan* case that white Southern feelings were especially hostile "to so-called 'outside agitators' "—a term, Justice Black dryly added, that "can be made to fit papers like the Times, which is published in New York."

In short, the libel suit brought by Commissioner Sullivan was a weapon in a political struggle. . . . And whatever else the amendment does, it protects political expression: the right of Americans to write and speak as they will about politics and public affairs. Such expression does not lose its immunity because it "diminishes the reputation of the officers whose conduct it deplores"; like judges, they must be " 'men of fortitude, able to thrive in a hardy climate.' . . ."

If criticism of official conduct may not be repressed,

> upon the ground that it is false or that it tends to harm official reputation, the inadequacy of these separate grounds is not surmounted by their combination. This was the basic lesson of the great assault on the short-lived Sedition Act of 1798, which first crystallized a national awareness of the central meaning of the First Amendment.
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> . . . The Sedition Act of 1798 made it a crime to defame the President, Congress or the federal government as a whole: it bring them "into contempt or disrepute." The Act made truth a defense, a liberalizing change from the English law of seditious libel, and provided that juries should decide both facts and law. But despite those reformist features, the law was denounced by the Jeffersonians as a violation of the first amendment—and the criticism carried the day. The Act was allowed to expire after two years, and Congress repaid the fines of those convicted under it. "[T]he verdict of history," . . . had found it unconstitutional.

Justice Brennan made the seditious libel analysis the crux of his opinion. "If neither factual error nor defamatory content" removes the constitutional shield from political expression, he said, no more do the two in combination. "This is the lesson to be drawn from the great controversy over the Sedition Act of 1798, . . . which first crystallized a national awareness of the central meaning of the First Amendment." The attack on the Act's constitutionality, Justice Brennan said, had "carried the day in the court of history."

That was the reasoning in *New York Times v. Sullivan*. I think it remains as persuasive today, and as elegant, as it was then. If there are doubts in the light of experience, they relate not to the Court's analysis of the threat that libel actions pose to first amendment freedoms but to the remedy adopted: the formula laid down by the Court to protect constitutional values in libel cases. . . .

Justice Brennan . . . said:

> The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

That is the rule of *New York Times v. Sullivan*. It is what most of us remember from that great case.

Three members of the Court—Justices Black, Douglas, and Goldberg— were not satisfied with that result. They would have prohibited any libel suit directed at criticism of official conduct. . . . The first amendment, Justice Black said, provided "absolute immunity for criticism of the way public officials do their public duty." He predicted that the majority's requirement of proof of actual malice would prove to be "an evanescent protection" for freedom of criticism. Judges and juries would get around it, he said: "This record certainly does not indicate that any different verdict would have been rendered here whatever the Court had charged the jury about 'malice,' 'truth,' 'good motives,' 'justifiable ends,' or any other legal formulas. . . ." No doubt in answer to that warning, Justice Brennan took an extraordinary step to make sure that the Alabama courts would not find some new way to punish the *Times* when the case went back down to them. He reexamined the facts, and found that they could not support a finding of actual malice.

The decision in *New York Times v. Sullivan* had an immediate and large impact on the law. For years there were virtually no recoveries by public officials in libel actions. The Supreme Court extended the rule to criminal libel, and then to public figures as well as officials. Alexander Meiklejohn, who for so many years had argued that the First Amendment must assure absolute freedom for political speech, said the decision was "an occasion for dancing in the streets."

But I need hardly say that publishers are not dancing in the streets today. Last July a

ury in Washington, D.C., awarded over $2 million to the president of the Mobil Oil Corporation, William Tavoulareas, for a *Washington Post* story stating that he had "set up his son" in a shipping management firm that did business with Mobil. Carol Burnett, the actress, won $1.6 million from the *National Enquirer*. A former Miss Wyoming won $26.5 million from *Penthouse Magazine*, reduced by the trial judge to $14 million, but the entire award was set aside on appeal. Newspapers in San Francisco and Oklahoma City and Alton, Illinois have faced judgments in the millions.

And it is not just judgments that worry publishers and reporters and others concerned with freedom of expression. It is the cost of defending libel actions: the cost not only in money but in time and in the psychological burden on editors and reporters. . . .

A study just carried out by the Libel Defense Resource Center analyzes cases decided across the country in the last two years. One hundred cases were decided by judges on motions for summary judgment: most commonly, motions by libel defendants claiming that plaintiffs could not meet the constitutional standard. Defendants prevailed in seventy-five percent of those summary judgment decisions. But of forty-seven cases that went to a jury, the plaintiffs won eighty-nine percent. If judges usually decide on summary judgment the cases in which plaintiffs' evidence is weakest, it is not surprising that plaintiffs do better in the remaining cases—those that go on to a jury. But the staggering difference in the figures must also in part reflect who made the decision: judge or jury.

Now recall the concern that moved the Supreme Court to its decision in *New York Times v. Sullivan*. Justice Brennan said the old common law rule, the Alabama rule, making the critic of official conduct guarantee the truth of his factual assertions, was unconstitutional because it led to self-censorship. Would-be critics, he said, "may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." But the *Sullivan* rule, as it is in fact working today, may have precisely that effect: It may discourage the voicing of criticism that is believed to be true and may indeed be true.

Any sensible publisher of comment on official conduct must worry today about the legal process and its expense. If there is a libel action, he knows there will be a massive discovery process. Apart from cost, his writers and editors may be tied up for months or years. Their editorial decisions will be reexamined, their thoughts probed. A good system of editorial checking may actually prove damaging, because internal criticism of an article or broadcast may become evidence of fault in publishing. The *Sullivan* rule remains a very useful defense before judges. But if the defendant cannot persuade a judge to dispose of the case on summary judgment, the rule may not make a difference to jurors. The jury will be free to award compensatory damages unrelated to actual financial loss, and punitive damages on any theory that strikes its fancy.

Freedom of expression is not the only value involved in libel cases: not for me, at any rate. There is also reputation, a characteristic close to the sense of self—to the integrity of one's personality. But is the libel action as it now works in the United States an effective remedy for a wounded reputation? I doubt it. The person who feels injured has to summon huge resources to wage the fight, and go through what may be an agonizing experience. Can General Westmoreland have any idea what it will be like to be questioned day after day in the discovery process, very likely week after week, about the course of the war in Vietnam? To be shown and asked about documents that were handled by some remote subordinate a dozen years ago or more? And then, if there is a trial, to go through it all again on the witness stand, having his judgment critically questioned in a war that, after all, was lost? It is not a process designed to burnish reputation.

The question—by now the urgent question—is how the great promise of *New York Times v. Sullivan* can be redeemed. It is a question that the Supreme Court should be asking. And I think there are some practical steps that may commend themselves even to justices with no burning passion for freedom of speech and press.

A first essential is to recognize that damages awarded without effective limit in libel may violate the first amendment. Damages unconstitutional? The idea must at first seem startling. Like other traditional tort actions, libel is premised on the understanding that law may not be able to restore a wronged party to exactly the position he had before the wrong was done; instead he is to be compensated for the harm suffered. Even if libel litigation may not repair a wounded reputation, that is, it may salve the purse. But the Supreme Court has already suggested that, in doing so, unrestricted damages engage the guarantees of free expression. In *Gertz v. Robert Welch, Inc.* in 1974 Justice Powell, writing for the Court, noted that common-law defamation was an oddity of tort law in presuming injury and allowing "recovery of purportedly compensatory damages without evidence of actual loss." The doctrine was not just odd, he suggested, but constitutionally dubious. It allowed juries to "punish unpopular opinion" under the guise of compensating individuals for injury, and it compounded "the potential of any system of liability for defamatory falsehood to inhibit the vigorous exercise of First Amendment freedoms." Moreover, he said, "the States have no substantial interest in securing for plaintiffs . . . gratuitous awards of money damages far in excess of any actual injury." Accordingly, *Gertz* held that the first amendment limited private libel plaintiffs who do not meet the *Sullivan* test of knowing or reckless falsehood to "compensation for actual injury." That was a first step—but a very modest one, because Justice Powell said that "actual injury" could include such intangibles as "mental anguish" and that there need be no evidence that "assigns an actual dollar value to the injury."

It is time now to take the logical next step and limit compensatory damages, constitutionally, to just that: compensation for proved injury. Beyond perhaps a symbolic sum, the injury would have to be tangible and measured by evidence of financial loss, because allowing recovery for "mental anguish" or other unmeasurable harm would allow juries to speculate at large and in effect bring back presumed damages. Such a rule would not at all compromise the true interest in defamation actions that alone justifies restraints on expression: the interest of reputation. The vindication of one's good name does not require colossal damage verdicts. Indeed, in countries far less concerned with freedom of expression, and more sensitive to interests of reputation, damage awards on the scale of recent American libel verdicts are simply unknown. Britain, for example, is feared by American journalists for its tough libel rules; yet the largest libel judgment known to have been paid in Britain was for 100,000 pounds—about $150,000 at current rates. . . .

Punitive damages are an even more anomalous feature of common-law libel. As Justice Powell said in *Gertz*, they amount to "private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." Such punishment and deterrence are the business of the criminal law, with all the safeguards surrounding it—safeguards lacking when a jury imposes punitive damages on any theory that strikes its fancy. When the Supreme Court decided *Sullivan*, it noted that the maximum fine for criminal libel in Alabama was $500: one-thousandth of what the jury awarded Mr. Sullivan. It is hard to imagine any state legislature today fixing a fine of $1.8 million for criminal libel, the amount imposed by the *Tavoulareas* jury to punish the *Washington Post*. No more can one imagine a legislature introducing for libel cases alone in this country the British rule that winning parties in civil cases have their legal fees paid by losers, as the Tavoulareas jury in effect required. Justice Powell recognized in *Gertz* that punitive damages are "wholly irrelevant" to the state interest in vindicating reputation, and that jury discretion to award them "in wholly unpredictable amounts . . . unnecessarily exacerbates the danger of media self-censorship." But as on compensatory damages, he shied away from the logic of ruling them out entirely. *Gertz* held that the states may not allow punitive damages "at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth." In short, if the actual malice standard is met, punitive damages may still be awarded.

The wiser rule was suggested in 1971 by Justice Marshall, dissenting in *Rosenbloom v. Metromedia, Inc.* In a scholarly opinion, he said the Constitution barred punitive damages in all libel cases, and limited compensatory damages to "proved, actual injuries." That rule would largely eliminate press fears that lead to self-censorship, he said, yet at the same time it would respect "society's interest in protecting individuals from defamation." Justice Powell's opinion for the Court in *Gertz* in fact relied on that earlier analysis of the damage problem. If it did not go all the way with Justice Marshall, that may be because Justice Powell preferred to test the question by further experience. His phrase "at least" in the holding seems to leave open the possibility that punitive damages may in time be found too intimidating to free expression to be allowed at all. By now the evidence is surely in. Experience in the near-decade since *Gertz* has made dramatically clear the threat of punitive damages awarded on a jury's whim. Punitive damages have no place in the defamation law of a country with a first amendment.

A second step to redeem the promise of the *Sullivan* case can be taken as a matter of judicial management rather than constitutional interpretation. That is for judges to play a fuller part in libel cases. Experience has shown that the protective benefits of the *Sullivan* rule may be mythical if juries are given unregulated discretion. Unless judges oversee the process rigorously, Justice Black will have been correct in his prediction that sophisticated legal theories would not protect the critics of official conduct.

There are a number of ways in which judges can be more active. One is to hold juries to the *Sullivan* test by special verdicts. That is, a jury would be required, in addition to returning a verdict in damages, to answer specific questions: Was the challenged statement false? Did the publisher know it was false when he published, or did he publish in reckless disregard of its truth? Such questions might well have exposed the faulty basis of jury deliberations reported in the *Tavoulareas* case. Judges should also be prepared to review jury verdicts rigorously to see that they square with the *Sullivan* rule. Appellate courts already evidence a good deal of skepticism toward libel juries; reversals in such cases as that of Miss Wyoming relieve some of the concern about mega-verdicts. But trial judges on motions for directed verdicts or judgments notwithstanding jury verdict, as well as appellate judges, should be prepared to scrutinize facts and law. After all, there is persuasive precedent: the Supreme Court's examination of the evidence in *Sullivan*.

The most important point for application of judicial control is on motions for summary judgment. A number of lower federal courts, concerned about the burden of libel actions on freedom of expression, had spoken of the need to resolve the cases on summary judgment if possible. Then, in a much-discussed 1979 dictum, Chief Justice Burger expressed "some doubt" about what he called the view that summary judgment "might well be the rule rather than the exception" where the issue was the existence of knowing or reckless falsehood. Since the *Sullivan* standard called a defendant's state of mind into question, he said, it did "not readily lend itself to summary disposition."

It is true that libel comes within the ordinary civil rules, which allow summary judgment to be granted only when there is no disputed material issue of fact. But the Supreme Court could properly, and meaningfully, remind trial judges of the particular need to dispose of cases promptly when the very existence of prolonged litigation threatens first amendment values. Judges vary greatly in the rigor with which they press for early disposition of civil cases. And that can make a great difference in the practical burden of libel litigation, as a recent case shows.

In 1979 the *Washington Post*, in a story on the Philadelphia police, described an incident in which policemen had beaten a black man, "breaking nightsticks on his head and shoulders, after he had run a stop sign." Three police officers sued for libel. They were not named in the story, but they had previously been charged with federal civil rights violations over that incident—and acquitted. On December 9, 1981, the trial judge denied a motion for summary judgment by the *Post*. "It is clear," he wrote, "that the author of the offending article conducted a very thorough investigation . . . . It is also reasonably clear that the reporter was and is convinced that his account of the incident was accurate . . . ." But the judge said that the plaintiffs might still be able to convince a jury that "the reporter was motivated by actual malice." How could someone be "motivated" by "actual malice"? As used by Justice Brennan in *Sullivan*, the phrase was a term of art meaning knowledge of falsehood or reckless disregard of truth or falsity. The trial judge was evidently using the term, wrongly, in the dictionary sense of malice: meaning ill will. Accordingly the *Post* asked him to reconsider his decision. In a memorandum of June 15, 1982, he denied the motion, saying: "To state that the reporter made a thorough investigation does not readily translate into an assertion that the reporter accurately incorporated the results of his investigation in his newspaper article, without bias or malice."

The case went to trial on October 18, 1982. The next day, at the close of plaintiffs' evidence, the judge dismissed the case. He said there could be "no doubt" that the reporters "thoroughly investigated" the incident. The plaintiffs themselves conceded, he said, that the writer of the *Post* article "sincerely believed, and still believes," that the alleged victim of police

brutality "was mistreated." He concluded: "From plaintiffs' own evidence, it is simply impossible to conclude that the article was written either with actual knowledge of its falsity, or with reckless disregard of the truth."

By all appearances, the judge stopped the trial to do what he could just as well have done on the motion for summary judgment—and should have done. Of course it may be said that he wanted to give the plaintiffs a further chance to come up with evidence of actual malice, but the summary judgment procedure should not allow such wishful possibilities—especially not in libel cases. Nor can deference to jury fact-finding have been a decisive consideration, since the judge's ultimate decision indicated that he would have overruled a jury verdict for plaintiffs. And the delay was costly. Preparation for trial, including lawyers' time and bringing witnesses to Philadelphia, cost the *Post* around $170,000—which would pay the salaries of five or six reporters for a year. If judges do not face the issues on summary judgment in libel cases, the litigation burden grows, and with it the in terrorem effect on potential critics.

Limitation of damages and a more active judicial role would help restore reason to our libel law. But those steps would not really vindicate the philosophy of *New York Times v. Sullivan*. Remember what Justice Brennan said: that in the field of political speech the First Amendment allows no test of truth to be administered by judges or juries. Justice Harlan put it beautifully in another case. "[I]n many areas which are at the center of public debate," he said, " 'truth' is not a readily identifiable concept, and putting to the preexisting prejudices of a jury the determination of what is 'true' may effectively institute a system of censorship."

The wisdom of those warnings against putting "truth" to a jury in political matters is perfectly demonstrated in the *Westmoreland* case. If it goes to trial, jurors will hear testimony from many witnesses about the "truth" of what General Westmoreland and others did in Vietnam—utterly conflicting testimony. Like Justice Harlan, I put "truth" in quotation marks because I do not believe there can be any such absolute in debates over Vietnam, even debates about ostensibly measurable things such as infiltration. There is a scene in a novel, *In the City of Fear*, by Ward Just, who was a reporter in Vietnam. The President of the United States is being briefed on Vietnam, and he begins to worry about the figures he gets. Are they cooked? he asks. One adviser replies, "Not cooked exactly. . . . All of the statistics are accurate, I'm sure." Another says: "That is the point about them. They are accurate, of course. Beautiful, in their way. And so numerous."[3]

In the Vietnam War a statistic could be true in a limited sense and false in another—in suggesting that what it measured pointed to a particular conclusion. And that is true not only of Vietnam but potentially of any public issue. The stuff of governmental decisions cannot be subject to a legal test of truth in our constitutional system. One man's truth is not another's. That is the central meaning of the first amendment: the right to differ about political truth, the right to criticize those who govern us without being held to a standard of temperateness or truth.

New York Times v. Sullivan rested on that proposition. But the Court shied away from its own logic when it said in the end that critical statements about public officials could be penalized if they were knowingly or recklessly false. The whole premise of Justice Brennan's opinion, its analysis in terms of seditious libel and the historical rejection of the Sedition Act of 1798, pointed to the conclusion that Americans may criticize the public actions of public men without fear of any penalty. If there can be no test of truth in political debate, then there can be no libel actions as a result of anything said in such debate.

A personal note is required here. What I am saying now represents a judgment reached in hindsight. When the *Sullivan* case was decided, I did not think Justice Black's view was persuasive. I still find his absolutist language uncongenial. But it is no longer possible to escape the realization that, in calling for "absolute immunity for criticism of the way public officials do their public duty," he was carrying out the logic—the compelling logic—of Justice Brennan's constitutional analysis. . . . The first amendment permits no libel actions against the critics of official conduct.

The suggested new rule, sweeping as it is, would not eliminate the need for judges to draw lines; few rules do. But I think it would free a very broad area of debate about politics and public life from the threat of litigation. Consider, for example, the distinction often drawn between general attacks on "policy" or "ideas" on the one hand and, on the other, particularized charges of personal wrongdoing by an official. Justice Harlan made the point that truth is especially hard to define when it comes to ideas. "Any nation which counts the *Scopes* trial as part of its heritage," he said, "cannot so readily expose ideas to sanctions on a jury finding of falsity." Justice Powell in *Gertz* distinguished ideas, which he said could never be punishably false under the first amendment, from "false statements of fact," which had no constitutional value. But the distinction is not so easy to draw. The *Westmoreland* case shows that. The infiltration statistics are "facts," but they are political facts not suitable for nice weighing to determine "truth." That will be so in many libel actions arguing facts in a political context. Similarly, many charges of "personal" wrongdoing may bear on a public official's fitness for office: Is it irrelevant to public concern that a legislator is found publicly drunk? Of course there may be an extreme end of the spectrum at which charges are so personal that they lose their connection to Professor Meiklejohn's business of governance. But public officials should be fair game for most comment, under the First Amendment. Their recourse is not litigation but rebuttal. As Professor Wechsler told the Court, the mayor falsely charged with taking a bribe has verbal reply as his only "avenue of retaliation."

Speech can be a highly effective weapon in reply to criticism, as the *Westmoreland* example reminds us. There is every indication that General Westmoreland was able to give his critics as good as he got. From the moment the CBS documentary was shown he denounced it, and he found many platforms: *TV Guide*, broadcasts, newspapers. He succeeded to the point that the public may well have thought better of him after than it did before the documentary. He did not need a legal forum. He used the marketplace, and that is where the debate belongs.

Private persons are in a very different position when they are criticized. They have not chosen the rigors of public life: assumed the risk of injury, as it were. And their opportunities to rebut criticism are slimmer. Justice Harlan had them in mind when he said the marketplace was the best testing ground for truth "where it functions." It does not function for the private person, because no one is interested in listening to him, and Justice Harlan warned against "the dangers of unchallengeable untruth."

For these reasons the Supreme Court seems to me to have got the balance of interests about right when it decided in *Gertz* that the states could allow private plaintiffs to recover for libel on any standard except liability without fault: The publisher, that is, must be shown at least to have been negligent in publishing a falsehood.

The hard problem of line-drawing is how to define and treat those who are more than private persons but less than official: public figures. The question may well be unanswerable by any formula. But I think we can see, now, that there have been flaws in the judicial attempts to draw the lines.

The *Sullivan* rule was rooted in our historical antipathy to seditious libel. Yet the Supreme Court quickly—and too glibly, I believe—extended the rule to nonpolitical situations. In *Time, Inc. v. Hill*, which was a specialized privacy case but really engaged the developing constitutional principles of libel, a majority applied the *Sullivan* rule to a private citizen who had been victimized years earlier by criminals and then had that episode put in a false light by *Life* magazine. Justice Brennan, speaking for the Court, said the First Amendment guarantees were "not the preserve of political expression or comment upon public affairs, essential as those are to healthy government." Nowadays, he said, a vast range of published matter exposed "persons to public view, both private citizens and public officials. Exposure of the self to others in varying degrees is a concomitant of life in a civilized community." That last statement makes me bristle, because I agree with Justice Brandeis that civilized men value the right to be let alone—the value should not need explanation in this totalitarian century. But putting aside the interest of privacy, what did a *Life* magazine article on Mr. Hill have to do with Professor Meiklejohn's First Amendment? With the Sedition Act of 1798? With the citizen's right to criticize his official servants?

The First Amendment in my view protects not only political but artistic expression. But its primary concern must be political speech, because in some measure the "core purpose" of the amendment relates to self-government. Professor Meiklejohn, even while urging an "absolute" First Amendment, drew a sharp distinction between "private defamations," in which the verbal attack has "no relation to the business of governing," and a political attack "properly regarded as a citizen's participation in government." The *Sullivan* opinion itself spoke of the right to criticize government, as identified in the Sedition Act controversy, as "the central meaning of the First Amendment." And when the Supreme Court extended the *Sullivan* rule to criminal libel, it said that "speech concerning public affairs is more than self-expression; it is the essence of self-government." To try to spread the protections of the rule too broadly over matters beyond the scope of public affairs runs the risk of diluting it.

In *Rosenbloom v. Metromedia, Inc.* a plurality opinion by Justice Brennan said the crucial consideration was not the status of the plaintiff in a libel action but the character of the issue treated in the challenged publication: "If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved." The holding that the *Sullivan* rule applied whenever there was an issue of public or general interest drew a strong dissent from Justice Marshall. Deciding what was a legitimate subject of public interest was not a proper role for judges, he warned, and that test would threaten "society's interest in protecting private individuals from being thrust into the public eye by the distorting light of defamation." Then, in *Gertz*, a majority abandoned the issue test and went back to the plaintiff's status. The Court held that "public figures" had to meet the *Sullivan* standard and defined them as either persons so prominent that they are public figures for all purposes or those who have thrust themselves into particular public controversies. But that definition produces an irony. The best-known public figures in this country, those most likely to fall into the Court's all-purpose category, are movie stars—and what do they have to do with "the central meaning of the First Amendment"?

If the plurality in *Rosenbloom* went too far in weakening the private person's remedy for defamation when he is involved in a matter of "public interest," as I believe, the majority in *Gertz* overreacted in removing the subject matter of controversy from the test altogether. Whether speech is relevant to public affairs must always be a critical question in determining the level of constitutional protection from libel actions. Justice Marshall had a point when he argued in dissent in *Rosenbloom* that judges would have difficulty defining what was a subject of "public or general interest." But as long as the values of reputation and free expression both command our respect, judges will have to draw lines somewhere. And relevance to "public affairs" or "government" is a more meaningful line to draw than whether something is of "public or general interest"—really a bootstrap expression, since anything publicized by a newspaper may be said to be of general interest.

It seems to me that nonofficials come within the philosophy of *New York Times v. Sullivan*, and should like officials be barred from bringing libel actions, only when they meet two tests: prominence in the community *and* relevance to public affairs. Carol Burnett and William Westmoreland are both prominent; both have assumed the risk of fame and can command a forum to answer their critics. But the subject of Miss Burnett's libel action, an attack on her personal behavior, was unrelated to public affairs. Hence the First Amendment bars General Westmoreland's suit but not hers. And William Tavoulareas? He is close to the line but, because the story raised issues of public policy and specifically concerned the Securities and Exchange Commission, I think his action should be barred. As I said, judges will still have to draw lines. But it is better to base the judgment on the reality of influence in public affairs than on an abstract definition of "public figure" that in practice is often abandoned because the plaintiff is remote from political concerns.

Libel is not the only form of litigation afflicted in this country today by endless discovery, high costs, extravagant jury verdicts. But it does not follow that the critics of official conduct must wait for general reforms in our law to get relief from burdens that induce self-censorship. It was the point of *New York Times v. Sullivan* that libel actions against public officials are not like other lawsuits: They invoke the first amendment. Justice Brennan was cautious in laying down a remedy in 1964. "We think," he said, that the Constitution requires the test of knowing or reckless falsehood. Time has shown that the test does not work well enough. The Court is free, and I think obligated now, to find a new remedy.

New York Times v. Sullivan remains, for me, a thrilling case. There is a grandness to the opinion from the opening

sentence: "We are required in this case to determine for the first time . . . ." At its heart is a concern to protect the function of "the citizen-critic of government," as Justice Brennan called him—called us. "It is as much his duty to criticize as it is the official's duty to administer." That view reflects not just the first amendment but the premise of our whole constitutional system: the belief that the citizen is sovereign. It is, we might say, the central meaning of the Constitution. It is time once again for the law to vindicate that understanding.

NOTES

1 376 U.S. 254 (1964).

2 Professor Alexander Bickel credited television coverage of the riots over desegregation in Little Rock and elsewhere with changing Northern attitudes on segregation.

> Compulsory segregation, like states' rights and like "The Southern Way of life," is an abstraction and, to a good many people, a neutral or sympathetic one. These riots, which were brought instantly, dramatically, and literally home to the American people, showed what it means concretely. Here were grown men and women furiously confronting their enemy: two, three, a half dozen scrubbed, starched, scared, and incredibly brave colored children. The moral bankruptcy, the shame of the thing, was evident.

A. Bickel, the Least Dangerous Branch 267 (1962).

3 W. Just, In the City of Fear 83 (1982).

POSTSCRIPT

SHOULD PUBLIC OFFICIALS BE ALLOWED TO SUE FOR LIBEL?

Why has there been an upsurge in libel litigation in recent years? Is it a temporary phenomenon or a problem that is unlikely to go away? We do know that it is a fairly recent development. In 1942, David Reisman wrote,

> [T]he American attitude towards reputation is unique. In Europe, where pre-capitalist concepts of honor, family, and privacy survive, reputation is a weighty matter not only for the remnants of the nobility who still fight duels to protect it, but for all the middle groups who flood the courts with petty slander litigations as we flood ours with automobile and other negligence actions. But where tradition is capitalistic rather than feudalistic, reputation is only an asset, "good will," not an attribute to be sought after for its intrinsic value. And in the United States these business attitudes have colored social relations. The law of libel is consequently unimportant.

The growth of libel law, like the growth of privacy law, mass media law and First Amendment law, might be related to the rise of new communications technologies. It is less possible today for any individual to control information about oneself. At this very moment, someone, or some computer, may be adding information to a file about you or taking information out of the file. Libel law tends to focus on famous and powerful people but it is really an outgrowth of a struggle that we all have, to preserve the accuracy of information about ourselves that is circulating almost constantly.

The most important cases in the area of libel are *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323 (1974); *Time* v. *Firestone*, 424 U.S. 448 (1976); *Herbert* v. *Lando*, 441 U.S. 153 (1979); *Pring* v. *Penthouse Int'l, Ltd.*, 695 F.2d 438 (1982); *Hutchinson* v. *Proxmire*, 443 U.S. 111 (1979); and *Tavoulareas* v. *Piro*, 567 F. Supp. 651 (1983), rev. 759 F.2d 90 (1985), reh. en banc. granted 763 F.2d 1472 (1985). Interesting articles include Smolla, "Let The Author Beware: The Rejuvenation of the American Law of Libel," 132 *Penn. L. Rev.* 1 (1983) and Franklin, "Suing Media for Libel: A Litigation Study," 1981 *Am. Bar Fdn. Research J.* 795.